



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

July 31, 1991

MEMORANDUM

TO: FRED EILAND
CHIEF, PRESS OFFICE

FROM: ROBERT J. COSTA *RC*
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF THE FINAL AUDIT REPORT ON THE
JACK KEMP FOR PRESIDENT AND THE KEMP/DANNEMEYER
AND VICTORY '88 JOINT FUNDRAISING COMMITTEES

Attached please find a copy of the Final Audit Report on The Jack Kemp for President and the Kemp/Dannemeyer and Victory '88 Joint Fundraising Committees, which was approved by the Commission on July 25, 1991.

Informational copies of the report have been received by all parties involved and the report may be released to the public.

Attachment as stated

cc: Office of General Counsel
Office of Public Disclosure
Reports Analysis Division
FEC Library

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RELEASE DATE: 7/25/91

REVISED DATE: 7/31/91



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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REPORT OF THE
AUDIT DIVISION
ON THE
JACK KEMP FOR PRESIDENT
AND
THE KEMP/DANNEMEYER AND VICTORY '88
JOINT FUNDRAISING COMMITTEES

I. Background

A. Overview

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This report is based on audits of Jack Kemp for President (the Committee), the Kemp/Dannemeyer Committee (K/D) and Victory '88 (V '88) to determine whether there has been compliance with the provisions of the Federal Election Campaign Act of 1971, as amended (the Act) and the Presidential Primary Matching Payment Account Act. The audit was conducted pursuant to 26 U.S.C. §9038(a) which states that After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received payments under Section 9037.

In addition, 26 U.S.C. §9039(b) and 11 C.F.R. §9038.1(a)(2) state, in relevant part, that the Commission may conduct other examinations and audits from time to time as it deems necessary.

1. The Jack Kemp for President Committee registered with the Federal Election Commission on April 6, 1987. The Committee maintains its headquarters in Falls Church, Virginia. The audit covered the period November 24, 1986 through April 30, 1988. In addition, certain other financial activity and disclosure reports were reviewed through December 31, 1989.

The Committee reported an opening cash balance of \$-0-; total receipts of \$18,942,695.68; total disbursements of \$18,821,791.92; and a closing cash balance of \$120,903.80*/ on April 30, 1988.

*/ These amounts do not foot due to apparent rounding errors on Committee reports.

2. The Kemp/Dannemeyer Committee registered with the Federal Election Commission as a joint fundraising representative on September 3, 1987. The reported participants in the fundraising activity were: the Dannemeyer for Congress Committee, principal campaign committee of Congressman William Dannemeyer of California; and Victory '88, a registered joint fundraising committee. The Kemp/Dannemeyer Committee maintains its headquarters in Falls Church, Virginia.

The audit covered the period from K/D's inception in August, 1987 through June 30, 1988. The Kemp/Dannemeyer Committee reported an opening cash balance of \$-0-; total receipts of \$65,970.85; total disbursements of \$65,189.41; and a closing cash balance on June 30, 1988 of \$781.44.

3. Victory '88 (formerly the Jack Kemp Super Bowl Committee) registered with the Federal Election Commission as a joint fundraising representative on December 1, 1986. Participants in various fundraising activities undertaken by Victory '88 were the Campaign for Prosperity (CFP), the Jack Kemp for President committee, Citizens for Jack Kemp (CFJK), and the McMaster for Senate Committee (MFS). Victory '88 maintains its headquarters in Falls Church, Virginia.

The audit covered the period from Victory '88's inception in November, 1986 through June 30, 1988. Certain activity was reviewed through 9/30/88. Victory '88 reported an opening cash balance of \$-0-; total receipts of \$1,650,557.09; total disbursements of \$1,611,377.39; and a closing cash balance on June 30, 1988 of \$39,179.70.

B. Key Personnel

The Treasurer of all three Committees is Mr. Scott Mackenzie.

C. Scope

The audits included such tests as verification of total reported receipts and expenditures and individual transactions; review of required supporting documentation; review of contribution and expenditure limitations; and other audit procedures as deemed necessary under the circumstances.

II. Jack Kemp for President Audit Findings and Recommendations Related to Title 2 of the United States Code

A. Apparent In-Kind Corporate Contribution

Under Section 441b of Title 2 of the United States Code, it is unlawful for any corporation to make a contribution or

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expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the forgoing offices, or for any candidate, political committee or other person knowingly to accept or receive any contribution prohibited by this section.

Section 100.7(a)(1)(iii) of Title 11 of the Code of Federal Regulations states that the term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value. The term "anything of value" includes all in-kind contributions. Unless specifically exempted under 11 C.F.R. §100.7(b), the provision of goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution.

The Committee contracted with National Media, Inc. (NMI) to provide media planning and placement services, including but not limited to:

- ° Media market analysis; reach and frequency analysis; comprehensive media plans and recommendations.
- ° Rate negotiation; schedule preparation and placement.
- ° Media reconciliation, including verification of invoices, affidavits, and notarized scripts.
- ° Timely reporting of financial summaries on cumulative and state by state basis.

In return for the performance of these services, the Committee paid NMI a commission equal to 5% of gross billings for advertising placed. According to Mr. Robin Roberts, President of NMI, the 5% commission was the normal fee charged his political clients.

However, based on broadcaster's invoices maintained by this Committee as well as others, it appeared that the 5% commission may have been less than the normal charge. These invoices contain the calculation of the net bill, the agency commission, and the gross billing. The commission that is shown on the broadcaster's invoices is consistently 15% of the gross billing.

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The interim audit report recommended that the Committee provide evidence which demonstrates that the 5% commission does not constitute the provision of services at less than the usual and normal amount NMI charges its non-political clients which are substantially similar in size and nature.

In response to the interim audit report, the Committee submitted a statement from Mr. Robin Roberts wherein he states that: 1) NMI does not adhere to any standard formula or commission but considers a number of factors when negotiating fees; 2) NMI charges its non-political clients fees which are comparable to the fees charged its political clients; and 3) NMI was fully compensated for work performed for Jack Kemp for President. In addition, the Committee submitted copies of articles from trade journals of the advertising industry which the Committee states "do not support the Audit staff's position" but reflect the Committee's position that the "15% commission was merely an arbitrary pricing arrangement without any meaningful relationship to the cost incurred by the agency in providing these services. Therefore, clients are negotiating today commissions and/or fixed fees that more accurately reflect those costs."

The Audit staff acknowledges that the trend in the advertising industry is toward a fee arrangement and accepts the representations made by the vendor.

Recommendation #1

Based on the above, the Audit staff recommends no further action with regard to this matter.

B. Excessive Contributions Received from Political Committees

During the review of contributions from political committees, the Audit staff noted contributions from four political committees which exceed the contribution limitation by \$5,350.00. Refunds totaling \$5,000.00 were made by the Committee four to seven months after receipt of the excessive contributions.

A separate account was not established by the Committee for possible illegal contributions, nor were account balances monitored to ensure that sufficient funds were available to make refunds.

The Committee was provided with a schedule of the excessive contributions at the exit conference.

In the interim audit report, the Audit staff recommended that the Committee refund the remaining \$350 in contributions from political committees. In response to the interim audit report, the Committee provided copies of the refund checks.

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Recommendation #2

In view of the small dollar amount and since the Committee refunded the remaining \$350 in excessive contributions, the Commission has determined that no further action is required.

C. Itemization of Contributions

Sections 434(b)(3)(A) and (B) of Title 2 of the United States Codes state that each report under this section shall disclose the identification of each person who makes a contribution to the reporting committee during the reporting period, whose contributions have an aggregate amount or value in excess of \$200 within the calendar year, together with the date and amount of any such contribution and each political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution.

1. Itemization of Contributions from Individuals

The Audit staff reviewed the Committee's receipt records to determine whether contributions aggregating in excess of \$200 per calendar year were itemized on the Committee's disclosure reports. A sample testing of contributions received from November 24, 1986 through March 31, 1988 indicated that the Committee failed to itemize a material number of contributions. Further analysis of the sample errors indicated that the problem was limited to 1986, June 1987, and February 1988. The Committee explained that all 1986 contributions were erroneously omitted from Schedule A and that, in some cases, the Committee's cut-off for preparing disclosure reports occurred before all of the contributor information was entered into the Committee's database.

On September 12, 1988, the Committee filed amended reports itemizing the previously unitemized contributions.

Recommendation #3

The Audit staff recommends no further action with regard to this matter.

2. Itemization of Contributions from Political Committees

The Committee's receipt records were reviewed to determine whether all contributions from political committees were itemized. The Audit staff determined that 59 contributions totaling \$37,930.00 were not itemized as required. This amount includes \$5,895.00 in contributions from political committees whose reports disclose contributions to the Committee but Committee records do not indicate their receipt.

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The failure to itemize the contributions may have resulted from the data entry cut-off described at Finding II. C. 1. above.

On September 12, 1988, the Committee filed amended reports itemizing \$31,856.00 in contributions from political committees. This amount does not include the \$5,895.00 in contributions described above. The remaining contributions from political committees not itemized as required total \$6,074.00. The Committee was provided with a schedule of the remaining unitemized contributions at the exit conference.

In the interim audit report, the Audit staff recommended that the Committee determine whether the \$5,895.00 in contributions described above require itemization and file amended reports if necessary to correct the itemization problem.

In its response to the interim audit report, the Committee stated that it believes that the September 12, 1988 amendments corrected the itemization problem and that no additional amendments are required.

Recommendation #4

In view of the small amount of contributions not resolved and the small amount of contributions not itemized, the Audit staff recommends no further action.

D. Matters Referred to The Office of General Counsel

Other matters noted during the audit have been referred to the Commission's Office of General Counsel.

III. Jack Kemp for President Committee - Findings and Recommendations Related to Title 26 of the United States Code

A. Calculation of Repayment Ratio

Section 9038(b)(2)(A) of Title 26 of the United States Code states that if the Commission determines that any amount of any payment made to a candidate from the matching payment account was used for any purpose other than to defray the qualified campaign expenses with respect to which such payment was made, it shall notify such candidate of the amount so used, and the candidate shall pay to the Secretary an amount equal to such amount. Section 9038(b)(2)(iii) of Title 11 of the Code of Federal Regulations states that the amount of any repayment sought under this section shall bear the same ratio to the total amount determined to have been used for non-qualified campaign expenses

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as the amount of matching funds certified to the candidate bears to the total amount of deposits of contributions and matching funds, as of the candidate's date of ineligibility.

The formula and appropriate calculation with respect to the Committee's receipt activity is as follows:

$$\frac{\text{Total Matching Funds Certified through the Date of Ineligibility - 3/10/88}}{\text{Numerator plus Private Contributions Received through 3/10/88}} = .319502$$
$$\frac{\$4,506,454.78}{\$4,506,454.78 + \$9,598,171.18} = .319502$$

Thus, the repayment ratio for non-qualified campaign expenses is 31.9502%.

B. Determination of Net Outstanding Campaign Obligations

Section 9034.5(a) of Title 11 of the Code of Federal Regulations requires that within 15 days of the candidate's date of ineligibility, the candidate submit a Statement of Net Outstanding Campaign Obligations which contains, among other items, the total of all outstanding obligations for qualified campaign expenses and an estimate of necessary winding down costs.

Section 9034.5(c)(1) states, in part, that a list of all capital assets shall be maintained by the Committee in accordance with 11 C.F.R. 9033.11(d). The fair market value of capital assets may be considered to be the total original cost of such items when acquired, less 40%, to account for depreciation, except that items acquired after the date of ineligibility must be valued at their fair market value on the date acquired. If the candidate wishes to claim a higher depreciation percentage for an item, he or she must list that capital asset on the statement separately and demonstrate, through documentation, the fair market value of each such asset.

In addition, 11 C.F.R. §9034.1(b) states, in part, that if on the date of ineligibility a candidate has net outstanding obligations as defined under 11 C.F.R. §9034.5, that candidate may continue to receive matching payments provided that on the date of payment there are remaining net outstanding campaign obligations.

The NOCO Statement is the basis for determining further matching fund entitlement. Mr. Kemp's date of ineligibility was March 10, 1988. Consequently, he may only receive matching payments to the extent that he has net outstanding campaign obligations as defined in 11 C.F.R. §9034.5.

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The Committee filed a Statement of Net Outstanding Campaign Obligations (NOCO) which reflected the Committee's financial position at March 10, 1988 and revised statements with each subsequent matching fund request. The Audit staff analyzed the Committee's NOCO Statement which was determined as of July 8, 1988 and made adjustments to properly reflect the Candidate's cash position and to correct other misstatements. The Committee's NOCO as adjusted by the Audit staff appears below.

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Jack Kemp for President
Statement of Net Outstanding
Campaign Obligations as of March 10, 1988
Determined as of July 8, 1988

ASSETS

Cash on Hand	\$ 104,666.56	
Accounts Receivable	1,871,882.80a/	
Capital & Other Assets	<u>27,268.51b/</u>	
TOTAL ASSETS		<u>\$2,003,817.87</u>

LIABILITIES

Disbursements for Qualified Campaign Expenses and Winding Down between 3/11/88 and 7/8/88	1,759,528.91c/	
Accounts Payable for Qualified Campaign Expenses as of 7/8/88	30,793.54d/	
Contribution Refunds 7/9/88-12/31/90	335,346.25	
Contribution Refunds Due at 12/31/90		
Prohibited Contributions	30,432.00	
Excessive Contributions	120,398.00	486,176.25e/
Joint Fundraising - Return of Misallocated Proceeds:		
Victory '88	59,043.37	
Kemp/Dannemeyer	685.33	59,728.70f/
Winding Down Costs		
Personnel	234,255.02	
Administration and Financeg/	514,390.32	
Legal Costs	<u>200,000.00</u>	
Total Winding Down Costs		<u>\$948,645.34</u>
TOTAL LIABILITIES		<u>(\$3,284,872.74)</u>
Net Outstanding Campaign Obligations		<u>(\$1,281,054.87)</u>

Notes to July 8, 1988
Statement of Net Outstanding Campaign
Obligations as of March 10, 1988

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- a/ Accounts Receivable includes matching funds, contributions, refunds, rebates, reimbursements and a bank loan received between March 11 and July 8, 1988. In addition, refunds verified and/or reported between July 9 and December 31, 1990 are included.
 - b/ Capital Assets. This amount excludes a \$4,134.55 loss on sale of assets included in the Committee's NOCO. No documentation to support the loss (over and above the 40% depreciation permitted at 11 C.F.R. §9034.5(c)(1)) has been provided.
 - c/ Qualified Campaign Expenses and Winding Down 3/11-7/8/88. This amount has been reduced for non-qualified campaign expenses paid during the period (amounts in excess of the state expenditure limitation; Iowa \$41,491.95; and New Hampshire \$29,342.52.
 - d/ Accounts Payable. Includes non-winding down expenses through 12/31/88 but excludes amounts paid in excess of the state limitations; Iowa \$1,979.84 and New Hampshire \$50.00.
 - e/ This amount is subject to change based on the final resolution of prohibited and excessive amounts.
 - f/ This amount represents the Audit staff calculation of excess distributions to the Committee from the indicated joint fundraising committee. The amount is subject to change.
 - g/ Administration and Finance. This amount includes accounting, contribution processing, matching fund processing, office space and overhead, and fundraising. This estimate is the reported amounts through 12/31/90.

Therefore, as of July 8, 1988, the candidate's maximum remaining matching fund entitlement was \$1,281,054.87. Using the Committee's contribution records through September 30, 1988, the Commission's matching fund records and Committee disclosure reports for October 1988 to December 1990, it was determined that the Committee received \$946,504.90 in combined private and public funding between July 9, 1988 and April 11, 1989, the date on which the Committee received its final matching fund payment.

Conclusion

As of April 11, 1989, the candidate had not received matching funds in excess of entitlement.

C. Use of Funds for Non-Qualified Campaign Expenses - Allocation of Expenditures to States

Section 441a(b)(1)(A) and 441a(c) of Title 2 of the United States Code and Section 9035(a) of Title 26 of the United States Code provide, in part, that no candidate for the office of President of the United States who is eligible under Section 9033 of Title 26 to receive payments from the Secretary of the Treasury may make expenditures in any one State aggregating in excess of the greater of 16 cents multiplied by the voting age population of the State, or \$200,000, as adjusted by the change in the Consumer Price Index.

Section 106.2(a)(1) of Title 11 of the Code of Federal Regulation states, in part, that expenditures incurred by a candidate's authorized committees(s) for the purpose of influencing the nomination of that candidate for the office of President with respect to a particular State shall be allocated to that State. An expenditure shall not necessarily be allocated to the State in which the expenditure is incurred or paid.

For the 1988 election the expenditure limitation for the State of Iowa was \$775,217.60 and for New Hampshire \$461,000.00. The Committee reports, from inception to April 30, 1988, disclosed expenditures totaling \$765,146.00 allocated to Iowa and \$425,968.00 allocated to New Hampshire.

At the entrance conference, the Committee's Treasurer informed the Audit staff that the files which demonstrated the derivation of the Committee's reported allocations had been lost. As a result, it would be necessary for he and his staff to reconstruct the allocations. The reconstructed allocations for Iowa and New Hampshire were presented several months later and in some cases, still included estimates. Along with the revised allocations, the Treasurer included detailed information, except for estimated amounts, which identified each disbursement, or portion thereof, included in the allocations.

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These revised allocations total \$754,051.11 for Iowa and \$460,820.93 for New Hampshire. It is these reconstructed allocation figures on which the following analysis is based. The categories of expenses shown below are the same as those used by the Committee.

1. Media Expenditures

Section 106.2(b)(2)(i)(B) of Title 11 of the Code of Federal Regulations requires that expenditures for radio television and similar types of advertisements purchased in a particular media market that covers more than one State shall be allocated to each State in proportion to the estimated audience. This allocation of expenditures, including any commission charged for the purchase of broadcast media, shall be made using industry market data.

The Committee did not allocate the cost of shipping associated with media buys in various states. The allocable portion of these costs for Iowa is \$1,275.00 and \$561.58 for New Hampshire.

The Committee's reconstructed allocation figures for New Hampshire contained an apparent estimate for radio time purchased. The amount is \$5,000.00. A review of records at the offices of the Committee's media firm in conjunction with Arbitron Ratings Radio indicated that the correct allocation is \$18,059.60. A similar review for Iowa radio expenses shows that the Committee allocation of \$27,751.59 was overstated by \$767.85 and should have been \$26,983.74.

In the response to the interim audit report, the Committee does not object to the reallocations with the exception of the costs of shipping television and radio commercials to broadcast stations. The Committee contends that these costs are properly included in production and hence not allocable. The Committee further contends that based on Commission past practice, if the allocation was reasonable at the time it was made and does not conflict with a specific allocation method the Audit staff must accept the Committee allocation.

The Audit staff does not accept that the cost of transporting commercials which the Committee has produced to the broadcaster for airing is a cost of production. Rather, the shipping cost is part of the cost to air the media product. Shipping costs vary with the airtime, not the cost of creating a specific commercial, and are properly considered part of the broadcast cost.

As noted above, 11 C.F.R. §106.2(b)(2)(i)(B) addresses expenditures for radio, television and similar types of advertisements, and states that commissions for the purchase of broadcast media shall be allocated. This language does not

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exclude all costs of advertisements except air time charges but uses the broader term, expenditures for advertisements. Further, 11 C.F.R. §106.2(a)(1) states that expenditures incurred for the purpose of influencing the nomination of a candidate with respect to a particular State shall be allocated to that State.

The Audit staff has made no adjustment to the interim audit report allocations.

2. Iowa and New Hampshire Personnel

Section 106.2(c)(5) of Title 11 of the Code of Federal Regulations states that an amount equal to 10% of campaign workers' salaries in a particular state may be excluded from allocation to that state as exempt fundraising expenditures, but the exemption shall not apply within 28 calendar days of the primary election.

The Committee's allocation documents indicated that allocable Iowa personnel costs totaled \$107,761.88. The Audit staff increased this amount by \$1,219.19 to \$108,981.07. The increase is required because the Committee had taken a 10% fundraising exemption on amounts incurred within 28 days of the Iowa caucus.

The Committee allocated \$41,631.65 in New Hampshire personnel costs. The Audit staff reduced the amount by \$2,096.01 to \$39,535.64. This reduction is the result of an upward adjustment to consider the 28 day restriction on the fundraising exclusion and a reduction due to the Committee's allocation of voided checks.

In the response to the interim audit report, the Committee proposes a reduction of \$362.64 to the audited Iowa personnel figure. The reduction involves the application of the 28 day rule on the fundraising exemption. The Audit staff accepts the Committee adjustment.

For New Hampshire personnel costs, the Committee proposes reduction to the audited cost of \$143.33. A portion of the amount relates to health insurance premiums for which better information was provided than was available at the time of the audit, and a correction for a consulting payment. After adjustment for compliance and fundraising exemptions, the adjustment should be a \$218.49 credit for a total amount allocable of \$39,317.15.

3. Payments to Vendors

Section 106.2(c)(5) states, in part, that 10% of overhead expenditures in a particular State may be excluded from allocation to that State as exempt fundraising expenditures, but this exemption shall not apply within 28 calendar days of the primary election.

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The Committee's allocations contained a category of expenses entitled "Iowa Vendors" and "NH Vendors" with allocations of \$86,308.93 and \$80,841.14 respectively. The payments in this category include expenses ranging from office overhead to printing, to hotels, to individuals.

During our review of committee disbursements, the Audit staff identified additional vendor payments allocable to Iowa of \$64,166.41 for a total of \$150,475.34 and additional amounts allocable to New Hampshire of \$42,887.50 for a total of \$123,728.64. The additional allocations represent some additional payments to the same vendors identified by the Committee and others are payments to vendors not included on the Committee's list. In addition, a portion of the increase is the result of the Committee's failure to recognize the 28 day limitation on the fundraising exemption for overhead expenses.

Also included in the interim audit report allocations were payments to Conus Communications totaling \$12,510.00. These payments were for satellite links and associated services for two debates between the candidate and Congressman Gephardt. One was held in Iowa in July 1987, the other was held in New Hampshire in August 1987. The satellite links apparently made the debate and follow-up interviews available to television news directors around the country.

The Committee's response to the interim audit report proposed a \$30,299.14 reduction to allocated amounts for Iowa vendors and a \$30,746.46 reduction to allocated amounts for New Hampshire vendors. In arriving at these reductions, the Committee both challenges some of the allocations made by the Audit staff and again recalculates some of their allocations. The response includes four listings of committee allocations, 2 each for Iowa and New Hampshire. One listing for each state shows the vendors originally allocated by the Committee and another shows those allocated by the Audit staff.

In reviewing the Committee's response, the Audit staff began with the Committee's allocations, verified the total disbursements to the interim audit report amounts and made adjustments based upon materials submitted by the Committee as well as documents contained in the audit workpapers. Attachment 1 shows the Committee's schedule along with adjustments to the Committee allocations made by the Audit staff. For Iowa, the Audit staff concluded the proper allocation was \$149,097.89 or a reduction of \$1,377.45 from the interim audit report and for New Hampshire \$119,211.00 or a reduction of \$4,517.64.

Discussed below are specific categories of adjustments to the allocations proposed by the Committee in their response to the interim audit report.

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° Section 106.2(b)(2)(D)(iv) of Title 11 of the Code of Federal Regulations states that overhead expenditures of committee offices located in a particular State shall be allocated to that State. The regulation goes on to list as examples of overhead: rent, utilities, office equipment, furniture, supplies and telephone base charges. Further, 11 C.F.R. 106.2(c)(5) provides a 10% compliance and 10% fundraising exemption for overhead expenses.

The Committee has classified as overhead, and taken the compliance and fundraising exemptions on, some expenses which are not overhead expenditures of a Committee office.

Included in these expenses are reimbursements to individuals using personal telephones for campaign business, printing and postage relating to events or mailings and materials purchased for events. Also, in the New Hampshire allocations, payments to AT&T and New England Telephone, have been included in overhead for the calculation of the compliance and fundraising exemptions. These payments were already net of 10% compliance and 10% fundraising, thereby doubling the allowable exemptions.

° As noted above, 11 C.F.R. 106.2(b)(2)(D)(iv) includes state office overhead expenses for office furniture and equipment and provides that these expenses shall be allocated to the State. The Committee has allocated only a portion of such expenses. In New Hampshire, the Committee allocated 40% of the cost of furniture and equipment to the state explaining that this represented the depreciation on the equipment. In addition, in their Iowa calculations, the Committee first reduces the purchase price of the equipment by a fraction the denominator of which is the number of days that the campaign operated and the numerator is the number of those days that the campaign owned the assets. This fraction was applied before the 40% depreciation was calculated.

The depreciation percentage appears to have been taken from 11 C.F.R. §9034.5(c)(1) which provides for a 40% depreciation for capital assets when preparing a Statement of Net Outstanding Campaign Obligations. The fraction based on days of ownership is not explained.

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Neither of these calculations are relevant to state allocation. The regulatory provision requires allocation less the applicable compliance and fundraising exemptions. If the furniture or equipment is subsequently sold, any receipts may be offset against the purchase price. Absent that, the entire amount is considered overhead of the State office where the furniture and equipment was used.

- ° Also related to the allocation of overhead expenses is the Committee's exclusion of office rent, utilities, equipment lease payments, and related services for periods following the date of a state's primary election. The Committee calculated a daily fee for such expenses and excluded an amount equal to the daily rate times the number of days between the primary election date and the end of the lease or service period. This was generally less than 30 days. The Committee argues that this reflects that post primary expenses do not influence the primary.

The Audit staff disagrees. The regulations require the allocation of overhead expenses for State offices and makes no exception for periods immediately following the primary election. The establishment of state offices has as its purpose the influencing of the primary in that state. It is not unusual for rents and utilities to run for a short period after the primary date reflecting normal billing cycles. These costs are part of the cost of establishing and maintaining the State office. In addition, activity at State office does not cease the day after the primary election. Some activity will be necessary to finish the office's business in the days following the primary. These expenses are also part of the cost of maintaining the office the purpose of which is to influence the primary election in that State.

In addition to overhead expenses related to the post primary period, the Committee excluded a consulting payment to a New Hampshire resident paid after the primary which the response states was to compensate him for time spent closing down the Kemp office in New Hampshire. The audit calculation includes this payment.

- ° The Committee's response to the interim audit report classified certain expenses as regional and

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allocated them among several states based on the relative voting age population of each state. In Iowa, the amount relates to the Midwest Regional Republican Conference. This event was attended by other campaigns as well and the description of the expenses which the Committee contests appear to be campaign related (i.e., Helium Tank, whistles, poster boards, ice cream, food and drink and hospitality suite). The conference was held in Des Moines in May of 1987. The Commission has determined that these expenses should be considered regional expenses and thus not allocable to the Iowa spending limitation. Accordingly, the Audit Staff adjusted the allocable amount noted above to exclude the expenses.

In New Hampshire, the regional expenses include a reimbursed printing bill, expenses for a regional conference paid to a consulting firm in New Hampshire, and a reimbursement paid to a person associated with the same firm and relating to a later luncheon. These expenses were originally allocated to New Hampshire by the Committee and no information concerning the nature of the events or documentation for the items other than check request forms and expense voucher cover sheets, have been provided. The final expenditure which the Committee classified as regional is for printing.

The audit workpapers contain a sample of the printed material which clearly indicates that the expense is for New Hampshire.

- The Committee made payments to party organizations in both Iowa and New Hampshire. In Iowa the payment was to attend a straw poll event. The Committee argues this event was aimed nationally and should be a national expense. The Audit staff disagrees. It was an event sponsored by the Iowa Republican Party in Iowa for Presidential Candidates. It was, in our opinion, an Iowa expense. In New Hampshire the Committee states that these expenses allowed Committee staff to attend events where they could meet potential contributors and hence, are fundraising. The fact that potential contributors may be identified at an event does not make the cost of attending the event fundraising.

The same argument could be made for any expense which resulted in Committee staff coming into

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contact with potential voters/contributors/supporters. No indication of any solicitation of funds is provided in the response.

- ° The Committee argues that like interstate travel and telephone calls, interstate shipping should be exempt. There is no regulatory support for the Committee's argument. The cost of shipping is generally considered part of the cost of the items shipped. When materials are shipped to Iowa or New Hampshire, the intent appears to be to influence the primary in those States.
- ° The Committee excludes from allocation the cost of campaign buttons for Iowa and New Hampshire, citing the exclusion for media production at 11 C.F.R. §106.2(e)(2). The cited regulation refers to production costs for "advertising media." Campaign buttons should not be considered "Advertising Media." However, if considered print media, the Commission's Financial Control and Compliance Manual at page 30 makes it clear that only layout and design are considered production. The invoices for these campaign buttons state that the artwork was provided by the Committee.
- ° The Committee's response to the interim audit report argued that the cost of satellite services in Iowa and New Hampshire are national, since the target audience was reporters in Washington, DC. As noted in the interim audit report, the satellite link also made the debates available to television newsrooms around the country.

The Commission has determined that the satellite costs are not allocable to the Iowa or New Hampshire spending limitations. Accordingly, the Audit Staff adjusted the allocable amount noted above to exclude these costs.
- ° The Audit staff also made a number of miscellaneous adjustments, including items left off the Committee allocations submitted in response to the Interim Audit Report, voided checks allocated by the Committee, application of the 28 day exclusion to the fundraising exemption, on salary and overhead expenses, and an item adjusted by the Audit staff in the interim audit report and neither accepted or challenged in the response.
- ° Finally, the Committee made a number of adjustments to both their own and audit allocations, but did not submit sufficient documentation to support the changes.

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4. Iowa and New Hampshire Accounts

Section 106.2(c)(5) of the Code of Federal Regulations states that an amount equal to 10% of campaign workers' salaries and overhead expenditures in a particular state may be excluded from allocation to that state as an exempt compliance cost. An additional amount equal to 10% of such salaries and overhead expenditures in a particular state may be excluded from allocation to that state as exempt fundraising expenditures, but this exemption shall not apply within 28 days of the primary election. Section 106.2(b)(2)(iv) defines overhead expenditures to include rent, utilities, office equipment, furniture, supplies, and telephone service base charges.

The Committee kept a checking account in both Iowa and New Hampshire. The Audit staff reviewed all disbursements from these accounts and made the following adjustments.

In Iowa, the Audit staff increased the committee allocation by \$4,155.87 to \$15,699.60. The majority of this difference relates to an apparent estimate of \$5,000.00 for exempt compliance and fundraising. The Audit staff analysis produced a compliance and fundraising exemption of \$696.02.

In New Hampshire, the Audit staff increased the Committee's allocation by \$260.39 to \$10,730.95. This difference results from the Committee not having considered the 28 day restriction on the 10% fundraising exemption for overhead items, and from including some non-overhead items in the overhead category.

The Committee's response to the interim audit report included a reallocation of expenses paid from the Iowa account. The proposed allocable amount was \$11,543.73. Amounts excluded from allocation by the Committee fall into two categories: national expense and compliance and fundraising exemptions for overhead.

Of the \$2,936.09 in expenses identified by the Committee as national expenses, only \$696.70 were categorized as such by the Audit staff. Much of what the Committee included was payments for express mail deliveries and hotel accommodations. The Committee states that "the expenses related to shipping items between Iowa and the national headquarters (i.e., Federal Express, UPS., and United Airlines) are non-allocable as an interstate expense." However, the Committee provided no documentation which shows that the items shipped went to locations other than Iowa. In addition, payments to hotels which the Committee indicates are related to "the Jack Kemp tour (national staff and press corps) and which have been treated as national expenses" are in fact payments for meeting rooms and other political events and are fully allocable to Iowa.

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The Committee states that it has taken advantage of the 10% compliance and fundraising exemptions applicable to overhead expenses "(i.e., rent, utilities, postage, office equipment and supplies, etc.)" However, the Committee has included as overhead, items which do not fall within the categories defined as overhead. The descriptions of the items provided in the Committee's response are, in some cases, not consistent with the descriptions on the original invoices reviewed by the Audit staff during the audit fieldwork. The Audit staff has excluded those items which are more appropriately categorized as political in nature and thus fully allocable.

In summary, the Audit staff increased the allocation contained in the Committee response by \$3,687.64 to \$15,231.25. The Audit staff's analysis produced a compliance and fundraising exemption of \$780.19 and a national expense exemption of \$696.70.

For New Hampshire, the Committee agrees with Audit staff's allocation of \$10,730.95.

5. Travel Expenses

Section 106.2(b)(2)(iii) states that travel and subsistence expenditures for persons working in a State for five consecutive days or more shall be allocated to that State in proportion to the amount of time spent in each State during a payroll period. For purposes of this section "subsistence" includes only expenditures for personal living expenses related to a particular individual traveling on committee business, such as food or lodging.

Section 106.2(b)(2)(ii) states that salaries paid to persons working in a particular state for five consecutive days or more, including advance staff, shall be allocated to each state in proportion to the amount of time spent in that State during a payroll period.

a. American Express

The Committee used an American Express card to pay certain expenses. The Audit staff reviewed the Committee's allocation of expenses charged on the American Express card and determined that, with the exception of one charge for an apparent intrastate aircraft charter in Iowa, the Committee's allocations are correct. Available documentation does not permit a determination of the passenger list or the length of travel for this charter. The Audit staff has increased the Committee's Iowa allocation by \$513.00 to \$4,002.38.

The Committee's allocation of American Express expenses allocable to New Hampshire was \$8423.14. The Audit staff agreed with the allocation.

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In its response to the interim audit report, the Committee reduced its Iowa allocation to \$1,664.50 and its New Hampshire allocation from \$8,423.14 to \$670.00. The Committee deducted certain amounts paid to hotels which the Committee states were travel-related expenses for the candidate and his traveling party which should have been charged to the national office. The Committee did not include documentation (e.g., invoices, receipts bills, etc.) which identified the staff responsible for the charges or the length of time spent at any location. The Audit staff is therefore unable to verify that the Committee's deductions are correct.

The Audit staff's allocation of the American Express payments remains unchanged at \$4,002.38 for Iowa and \$8,423.14 for New Hampshire.

b. Chartered Aircraft

The Committee included an estimate of \$10,000 for chartered aircraft in their Iowa allocations in addition to the charge discussed in a., above. The Audit staff reviewed the charter billings in Committee files and using the available travel itineraries determined that all charters were either interstate or did not involve travel of 5 or more consecutive days.

c. National Staff Travel

The Committee allocated travel expenses to Iowa of \$17,351.63, and to New Hampshire of \$4,375.01. The Audit staff reviewed the Committee's travel files and identified additional allocable travel expenses. In Iowa, an additional \$23,333.81 was allocated bringing the total to \$40,685.44, and in New Hampshire an additional \$9,875.05 was allocated for a total of \$14,250.06.

These additional allocations are primarily due to individuals who traveled in the states for more than four consecutive days but whose travel expenses were not allocated by the Committee.*/ Also included are travel expense payments to a number of entities who are apparently vendors rather than committee personnel. Travel expenses for such persons were allocated regardless of their length of stay.

The Iowa allocation adjustment includes expenses incurred by three individuals who spent periods of time in Omaha, Nebraska (Hughes Grehan, Lewis Pipkin, Hagood Tighe).

*/ When determining whether a campaign staff person worked in a state for more than 4 consecutive days, the Audit staff counted calendar days or any portion thereof, rather than 24 hour periods. See Financial Control and Compliance Manual for presidential Primary Candidates Receiving Public Financing, p. 32 (April 1987 edition).

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An analysis of the Committee's automated expense file indicates that the Committee had no Nebraska campaign. Expenses coded to Nebraska (after adjustment for miscoding) total only \$11,083.81. Of this amount, \$8,279.03 relates to these three individuals and rental cars with which Mr. Tighe, Mr. Grehan and two other staff members are associated. Mr. Tighe and Mr. Pipkin were both in Omaha through February 9, 1988, the day after the Iowa Caucus. The rental cars were also due to be returned on February 9, 1988. After February 9, 1988, no further travel to Omaha for any of these three individuals was noted. Of the remaining \$2,804.73 coded to Nebraska, a number of items appear to be Iowa related. For example, a travel voucher which indicates Iowa as the location of the travel but notes that the traveler used an Omaha Hotel, a travel voucher for a trip to Omaha to meet the Iowa staff and reimbursement to a person with an Omaha address for travel in Iowa. It is also noted that Omaha, Nebraska is separated from Council Bluffs, Iowa by the Missouri River, the Nebraska primary is not until May 10, 1988, and Mr. Tighe's salary for December and January is attributed to Iowa in the Committee's payroll register.

In response to the interim audit report, the Committee proposed a \$31,651.02 reduction in the Audit allocation. The Committee submitted a schedule of its revised national staff travel expenses allocable to Iowa compared to the Audit staff's allocation of those expenses. The Committee's schedule includes only those items for which the Audit allocation differs from the Committee's original allocation. In addition, the Committee's revised total (\$9,034.42) includes only the portion of the Audit staff's allocations accepted by the Committee. The Committee has excluded most of their original allocations. Since the response makes no mention of such an exclusion the Audit staff assumes that it was an oversight. Consequently, the Committee's response to the interim audit report relates to only \$25,338.85 of the Audit staff's allocation. To that amount the Committee proposes a reduction of \$16,304.43. The reduction relates to the following:

1. As stated above, the Audit staff allocated travel expense payments to four entities who are apparently vendors. The committee contends that the Audit staff incorrectly assumed that the individuals in question were not national campaign staff because they were not paid monthly retainers. The Committee states that 3 of the individuals' travel and consulting fees should be considered national expenses on the basis that the individuals did not remain in Iowa for five consecutive days. According to the Committee, the fourth individual, Mike Simpferfer, was a fundraising consultant in Iowa and a national headquarters staff person in Washington, DC; therefore, the Committee believes that none of his consulting fees or travel expenses are allocable.

The Commission determined that the travel expenses for the three individuals in question are subject to the five-day rule. Accordingly, the Audit Staff revised its

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allocation of the expenses for those individuals, reducing the allocable amount by \$11,511.45.

Regarding Mr. Simpfenderfer, the Audit staff notes that the expenses allocated relate to a period of time when Mr. Simpfenderfer was residing in Iowa.

The response contains nothing to support the committee's contention that Mr. Simpfenderfer's duties and expenses during the several months he resided in Iowa are either partially or wholly fundraising.

The Audit staff allocated the applicable travel related expenses for Mr. Simpfenderfer.

2. For two individuals, the Committee deducted lodging and per diem expenses for the day following the Iowa caucus as well as expenses for interstate travel between Iowa and Nebraska.

The lodging and per diem expenses were incurred for the purpose of influencing the candidate's nomination in Iowa and as such are fully allocable. With respect to the interstate travel, the Audit staff agrees with the Committee and has reduced the allocable amount by \$26.80.

3. The Committee deducted the expenses of one individual because they were for "incidental services performed by his secretary in Southern California" which included typing thank you notes to people the individual met in Iowa.

The Committee's exclusion of the expenses appears to be based on the fact that the secretary was located in Southern California. According 11 C.F.R. §106.2(a)(1), an expenditure shall not necessarily be allocated to the State in which the expenditure is incurred or paid. The costs of the thank you notes appear to be a cost related to the individual's trip to Iowa and as such are fully allocable.

4. The Committee deducted the expenses of an individual which it states were imputed based on the Audit staff's assumption that the individual remained in Iowa for nine days although he did not submit an expense report for the period. The Committee states that it does not accept the Audit staff's theory of "imputed expenses."

The Committee is in error. The Audit staff based the allocation of the individual's expenses on expense reports filed by the individual and paid by the Committee. Copies of the expense reports were provided to the Committee at the exit conference.

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5. Finally, the Committee has reduced the amount of allocable expenses for one individual because, according to the Committee, the Audit staff "appears to have taken an erroneous figure of \$331.98" and is using it as the amount allocable to Iowa. The Committee states that the individual submitted an expense report dated January 14, 1988 for meeting expenses in Iowa. The Committee allocated the full amount, \$108.38, to Iowa.

The Committee failed to acknowledge that the individual submitted two other expense reports for Iowa expenses dated January 4, 1987 and November 30, 1987 in the amounts of \$114.20 and \$109.40 respectively. The Audit staff allocated those amounts as well, for a total of \$331.98.

d. Travel Expenses Paid by Committee Staff

The interim audit report Finding II E.3.b. recommended that the Committee provide information with respect to expenses associated with the campaign related activities of 12 individuals who failed to file expense vouchers for time spent in Iowa and New Hampshire. On September 21, 1990, the Commission issued subpoenas to the Committee requiring the production of the information. In response to the subpoena the Committee submitted documents which indicate that for certain individuals additional amounts are allocable to Iowa.

1. Haqood Tighe

In response to the subpoena, the Committee submitted two expense reports which cover the period 1/10/88 through 1/23/88. The reports support that Mr. Tighe was in Omaha from 1/16 - 1/22/88 and indicate additional amounts allocable to Iowa in the amount of \$249.87.

2. Dug Garrett

In response to the subpoena, the committee submitted copies of expenses reports for Mr. Garrett which cover the period 1/3/88 through 2/9/88. In addition, copies of expense reports for other individuals were submitted. All of the submitted reports were apparently rejected for reimbursement by the committee but were apparently paid by Mr. Garrett.

The other individuals for whom expense reports were submitted were: Lisa Buestrin, Joe Bynum, Andrew Heckler, Henry Hyde, Richard Isaacson, Jennifer Kemp, and Will Lynch.

A review of the expense reports indicates that an additional \$8,974.73 is allocable to the Iowa spending limitation since certain of the individuals were present in the Iowa for five consecutive days or more. For two of the individuals, additional salary is also allocable. See Section 5.e., National Staff Salary.

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The Audit staff's total allocable amount for national staff travel expenses in Iowa is \$38,371.19. In the response to the interim audit report, the Committee agreed with the Audit staff's allocation of \$14,250.06 to New Hampshire.

e. National Staff Salary

As a result of the increased travel allocations, additional allocable salaries and consulting fees were identified. The Committee allocated \$7,678.21 in salaries and consulting fees to the Iowa spending limitation and nothing to New Hampshire. Based on the Audit staff review, the interim audit report proposed an additional \$12,833.03 requiring allocation to Iowa for a total of \$20,511.24 and \$3,119.06 requiring allocation to New Hampshire.

In response to the interim audit report, the Committee proposed a \$15,096.09 reduction in the allocation to Iowa and accepted the report allocation in New Hampshire. The Committee submitted a schedule of its revised national staff payroll allocable to Iowa compared to the Audit allocation of those expenses. As with the national staff travel allocation, the Committee's schedule includes only those items where the Committee disagrees with all or a portion of the Audit staff's additional Iowa allocations. In addition, the Committee's revised total (\$5,415.15) includes only those portions of the Audit staff's additional allocations accepted by the Committee. The Committee has apparently excluded most of their original allocations. Since the response makes no mention of such an exclusion the Audit staff assumes that it was an oversight. Consequently, the Committee's response relates to only \$14,353.53, of the Audit staff's allocation. To that amount, the Committee proposed a reduction of \$8,938.38. The reduction relates to the following individuals:

Dug Garrett - The Committee reduced the allocation of Mr. Garrett's salary by \$1,468.39. The Committee calculated a daily salary rate for Mr. Garrett which differs slightly from the Audit staff's calculation. However, most of the reduction relates to consulting fees which according to the Committee were paid for wind down services performed in March and retroactively spread by the Audit staff over January and February. The Committee states that only the amounts actually paid during Mr. Garrett's tenure in Iowa should be allocated.

The daily salary rate calculated by the Committee does not include applicable FICA tax or medical insurance paid by the Committee. The Audit staff calculated a daily rate which correctly reflects those items.

The consulting fees in question consist of two checks in the amount of \$3,000 each. The memo line of one check dated February 22, 1988 is annotated with the words "consulting fee - January." The Audit staff attributed the February 22, 1988 check to the month of January and allocated a portion of the

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amount to Iowa based on the number of days Mr. Garrett was in Iowa considering the five day rule at 11 C.F.R. 106.2(b)(2)(D)(ii). It is also noted that Mr. Garrett was paid a salary for the month of January. The second check was dated March 8, 1988 and though not annotated with the month the consulting payment was meant to cover, it is assumed to be for February 1988. No salary was paid by the Committee during that month. The allocation of the payment followed the same method as was employed for the February 22, 1988 payment.

Hughes Grehan - The Committee states that its calculation of the daily salary rate differs from the Audit staff's figure.

In fact the Committee's response to the interim audit report shows no allocation for Mr. Grehan. The Audit staff determined that the Committee paid Mr. Grehan a consulting fee in the amount \$1,250 by a check dated February 22, 1988. The memo line of the check was annotated with the words "consulting fee - January." The Audit staff determined that a portion of that payment was allocable to Iowa and proceeded accordingly.

Richard Isaacson and Peter Sterling - The Committee states that its calculation of the daily salary rate differs from the Audit staff's figure.

The daily salary rate calculated by the Committee does not include applicable FICA tax paid by the Committee. The Audit staff calculated a daily rate which correctly reflects that cost.

Mike Lehman and Lewis Pipkin - The Committee calculated a daily rate which differs slightly from the Audit staff's figure. The Audit staff's allocation for the two individuals exceeds the Committee's amount by less than \$1.00 per day.

Mike Simpferfer - The Committee contends that Mr. Simpferfer is a fundraising consultant and national staff person, therefore, his compensation is non-allocable to Iowa. Though no support is submitted for the Committee's characterization of Mr. Simpferfer's function with the campaign, the nature of his work in the State is not the controlling factor. All amounts allocated represent a period when Mr. Simpferfer apparently resided in Des Moines. Since the Committee selected the method for allocating salary to compliance and fundraising provided at 11 C.F.R. 106.2(c)(5), the method must be used for all campaign workers in that State. (See above, National Staff Travel Section c.)

Hagood Tighe - The Committee calculated a daily salary rate which differs slightly from the Audit staff's figure. In addition, the committee states that the Audit staff applied an "imputed payroll" figure for the period 2/1/88-2/9/88.

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The Committee disagrees with the Audit staff's use of "imputed payroll" as an allocable expense.

The daily rate calculated by the Committee does not include applicable FICA tax paid by the Committee. The Audit staff calculated a daily rate which correctly reflects that cost.

The consulting fee in question was paid to Mr. Tigue by a check in the amount of \$1,000, dated March 31, 1988. The audit staff believes that these payments should be considered compensation for the month of February when the Committee suspended payroll. The Committee's date of ineligibility was March 10, 1988, hence, most campaign staff was not re-employed after the February payroll hiatus.

In addition to the above, the Audit staff adjusted its allocation of payroll expenses to include a 10% compliance exemption not previously calculated for two individuals.

As stated in Section 5.d. above, National Staff Travel, the Commission issued subpoenas to the Committee requiring the production of additional information on travel expenses incurred by certain individuals who failed to file expense vouchers for travel in Iowa and New Hampshire. The response indicates that additional amounts are allocable to the Iowa spending limitation. For two of the individuals referenced in the Committee's response, additional salary is also allocable: \$3,178.40 for Mr. Dug Garrett and \$638.66 for Mr. Richard Isaacson.

The Audit staff revised the amount of national staff payroll allocable to Iowa from \$20,571.24 to \$24,268.39.

6. Voter Contact Costs

In this category the Committee included several vendors who provided direct mail services with associated postage, and telephone canvassing services.

a. Voter Contact Services

The Committee paid Voter Contact Services for computer work, keypunching, labels, etc. for Iowa and New Hampshire. The reconstructed Iowa allocation figures provided by the Committee included the vendor's listing of all of its invoices, and an allocation of the charges between Iowa and New Hampshire. The Committee included in their \$39,428.48 Iowa allocation amount all invoices not indicated as being New Hampshire related. No amount was allocated to New Hampshire by the Committee.

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The Audit staff reviewed the Committee's allocations and reduced the Iowa allocation by \$1,612.56 to \$37,815.92. This adjustment reflects an apparent overstatement of one billing amount, an invoice which should have been split between Iowa and New Hampshire and a credit which the Committee did not consider. The invoices which indicate that the work was New Hampshire related total \$15,548.40. The Audit staff has added this amount to the New Hampshire allocations.

In its response to the interim audit report, the Committee agreed with the Audit staff's allocation.

b. Long River Communications

According to Committee records, Long River Communications was retained to conduct telephone survey and get-out-the-vote programs in Iowa. The Committee allocated payments to Long River Communications totaling \$39,821.00 to the Iowa expenditure limitation. The Audit staff identified an additional payment of \$6,500.00 made on February 4, 1988, which the Committee did not allocate. The Committee's computerized disbursement files show this payment coded to Iowa.

In its response to the interim audit report, the Committee states that it was unable to locate the \$6,500 referred to above, and is therefore maintaining its original allocation figure.

The Audit staff identified check number 3414 in the amount of \$6,500, dated February 4, 1988 and payable to Long River Communications on the Committee's check register, computerized vendor history and Schedule B of the Committee's disclosure reports. In addition, audit workpapers prepared during audit fieldwork indicate that check number 3414 was paid by the bank.

The Audit staff maintains that the additional amount is allocable to Iowa.

c. Haughton & Company

Haughton & Company prepared flyers, brochures and other campaign material. The Committee allocated \$65,943.81 in payments to Haughton & Company to the Iowa expenditure limitation and \$16,676.55 to New Hampshire. The Audit staff reviewed these allocations and identified additional amounts requiring allocation. For Iowa an additional \$11,064.41 was allocated for a total of \$77,008.22 and for New Hampshire an additional \$2,702.68 was allocated for a total of \$19,379.23.

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In addition to invoices for particular printing and shipping charges, a portion of the adjustments represented the allocation of consulting fees paid by the Committee. These fees totaled \$12,350.00 and were not allocated by the Committee. The Audit staff prorated a portion of the fees to Iowa and New Hampshire based upon the relative amounts allocated to each state. The allocation was \$4,069.33 for Iowa and \$1,023.82 for New Hampshire.

In its response to the interim audit report, the Committee submitted revised schedules of costs allocable to Iowa and New Hampshire. The Committee's revised total amount allocable to Iowa is \$67,243.12 and the New Hampshire amount is \$10,693.61. The Committee did not include costs which it states relate to "the production costs of generic advertising materials such as brochures and yard signs." The Committee states that "shipping and printing costs are inseparable, and must be added together to arrive at the production cost of the final product. Therefore, in allocating Haughton & Company invoices to Iowa (and New Hampshire), shipping costs are treated as if they were another element within the print job" and therefore, are non-allocable.

The Committee also omitted the prorated consulting fee paid to Haughton & Company. The Committee states that Paul Haughton (d.b.a. Haughton & Company) served as the Executive Director of the State of Alabama and as the Southern States Regional Coordinator and that the southern states benefited from Mr. Haughton's political expertise, not Iowa or New Hampshire.

The Audit staff disagrees with most of the deductions taken by the Committee. According to the Commission's "Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Financing" (page 30, April 1987 edition), the cost of print media production does not extend to the cost of printing and distribution of such material. Therefore, the Committee's premise for excluding \$5,435.77 from the Iowa allocable amount and \$2,216.83 from the New Hampshire allocable amount is invalid. The Audit staff notes that the Committee's revised schedules of allocable costs include some shipping costs.

The Committee deducted an additional \$5,444.97 from the New Hampshire allocable amount for costs which do not appear to be New Hampshire related. The Audit staff agrees with the deduction but notes that the amount was included in the Committee's original allocation.

The Audit staff reduced the Iowa allocable amount by \$684.20 to adjust for one invoice which the Audit staff overstated by \$260 and another invoice which the Committee allocated 100% to Iowa but should have allocated 50% to New Hampshire. Thus, a reduction to the Iowa allocable amount of

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\$424.20 is appropriate for this invoice as well as an increase to New Hampshire in the same amount.

With respect to the consulting fees, the Audit staff notes that the Committee made all of its payments to Haughton & Company except for one payment in the amount of \$1,003.12 which was payable to Paul Haughton. The reported purpose of that payment was to reimburse travel, food and lodging expense. All payments to Haughton & Company were coded in the Committee's computerized disbursements file as one of three categories: collateral materials, political mailings, or direct mail. Mr. Paul Haughton is not listed among other consultants in the Committee's history of consulting payments nor is he included on the Committee's payroll history.

Recently, in the context of a similar case, the Commission determined that consulting fees such as those described above are not allocable expenses. Therefore, the Audit staff has not included the pro rated consulting fees (\$4,032.28 for Iowa and \$743.47 for New Hampshire) in the final allocation amounts.

The Audit staff's revised allocation to Iowa is \$72,254.69 and \$13,334.64 to New Hampshire.

d. Anne Stone & Associates, Inc. (ASA)

This vendor provided direct mail services to the Committee for political mailings. The Committee allocated \$57,150.57 in payments to Anne Stone & Associates to the Iowa expenditure limitation and \$37,411.41 to New Hampshire. The Audit staff allocated an additional \$6,745.30 to the Iowa expenditure limitation and an additional \$4,010.68 to New Hampshire for total allocations of \$63,895.87 and \$41,610.12, respectively. As with Haughton and Company, the increases in allocable amounts included a pro rata share of consulting fees (\$12,000.00) paid in addition to amounts for specific services.

In its response to the interim audit report, the committee submitted schedules of amounts which it has deducted from allocation to Iowa or New Hampshire. The Committee deducted \$8,350.36 from the Iowa allocation and \$5,293.65 from New Hampshire. The deductions relate to three categories.

The first category is "fundraising-package." The Audit staff allocated the cost of two direct mail pieces entitled "Differences" to Iowa and New Hampshire. The Committee states that "Differences" is a fundraising appeal and is therefore non-allocable. The Committee did not submit a copy of the piece or any other documentation to support that it is a fundraising appeal. Furthermore, the order date of the piece whose cost was allocated to New Hampshire is within the 28 day period prior to the New Hampshire primary and therefore not eligible for the fundraising exemption. The Audit staff notes that the cost of the

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Iowa "Differences" piece is incorrectly quoted by the Committee as \$2,710.98. The correct amount is \$2,620.38. The difference, \$90.60, relates to the cost of printing an article which was sent to Iowa. The Audit staff allocated the amount (\$90.60) to Iowa.

The second category is "Cancellation Fee." The Committee engaged ASA to do a direct mailing to Iowa and New Hampshire but canceled the order prior to its completion. ASA charged the Committee a \$2,700 cancellation fee. The Committee originally allocated a portion of the fee to Iowa (\$1,605.06) and to New Hampshire (\$1,094.94) and the Audit staff agreed. In the response to the interim audit report, the Committee states that "the cancellation fee was not 'incurred for the purpose of influencing the candidate's nomination' in Iowa [or New Hampshire], and is therefore not allocable to the State."

It is the Audit staff's opinion that the original order was incurred for the purpose of influencing the candidate's nomination in Iowa and New Hampshire and the cancellation fee is a related cost of such effort and is therefore allocable.

The third category is "consulting fee." The Committee states that, "ASA is a firm engaged in the business of direct mail. In addition, ASA has a particular expertise in direct mail fundraising. Although [the Committee] used ASA to provide a variety of direct mail services, the consulting fee in question related to ASA's service concerning direct mail fundraising efforts and, as such, should be categorized as a non-allocable expense."

The Audit staff acknowledges that a portion of the work performed by ASA is likely fundraising. However, there is no indication that consulting payments relate solely to ASA's fundraising work. The Audit staff calculation associates the consulting proportionately to all work performed. However, in a similar case the Commission concluded that consulting fees such as those discussed above do not require allocation to state spending limitations. Therefore, the Audit staff has adjusted the allocations to exclude the pro rata portion of the consulting fee (\$4,034.32 in Iowa and \$2,627.22 in New Hampshire).

The revised amounts allocable to the Iowa and New Hampshire spending limitations are \$59,861.55 and \$38,982.90

e. Postage

The Committee allocated \$10,000 in postage expenses to the Iowa expenditure limitation and \$20,455.73 to New Hampshire. The Audit staff conducted a review of amounts paid for postage and provided copies of our analysis to the Committee. The Committee's New Hampshire allocation agrees with the Audit staff analysis. For Iowa, the Committee's allocation is an apparent

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estimate. The Audit staff allocation was \$53,257.35.

In the response to the interim audit report, the Committee accepted the staff allocation for postage in both States. Included in the Iowa amount was a deposit into the Committee's Des Moines bulk mail account for \$11,076.45. No Committee check was located for this amount. During a review of this finding, the Committee's response, and the allocations of payments to Haughton & Company, an invoice for postage for a Social Security Letter was noted. The amount matches the deposit. The Haughton & Company invoice is within 3 days of the deposit. The payment was allocated to Iowa. Given the above, it appears that this amount is allocated twice in the interim report figures as well as in the Committee's response.

The corrected postage allocation for Iowa is \$42,180.90.

7. Polling

The Committee made payments to Tarrance, Hill, Newport & Ryan for polling in 1987 and Tarrance & Associates in 1988. In 1987, polls were conducted only in Iowa and New Hampshire and the Committee allocated the cost of specific surveys to those states. In addition to billings for individual surveys, the Committee paid a total of \$19,100.00 in consulting fees in 1987. The Committee did not allocate any portion of these fees. The Audit staff prorated the consulting fees based on the relative amounts of non-consulting charges allocated to Iowa and New Hampshire. The additional allocation is \$7,519.67 in Iowa for a total of \$22,519.67 and \$11,580.33 in New Hampshire for a total of \$34,680.33.

In 1988, the Committee paid Tarrance & Associates \$36,790.24 for polling. This represents one survey in Iowa, two in New Hampshire and one in South Carolina. In addition, the Committee paid for a "focus group" (\$4,200) billed on January 26, 1988 and paid one charge of \$4,500 on February 24, 1988 for which no documentation was available in Committee files. Documentation for the focus group does not indicate if it relates to a particular state.

Since, all other survey billings by both firms relate to a particular state; only one survey (paid for on March 7, 1988) relates to any state other than Iowa and New Hampshire; and given the dates associated with these charges, the focus group billing of \$4,200 has been included as an Iowa expense and the undocumented payment of \$4,500 has been included as a New Hampshire expense pending the submission of additional documentation. Total allocations for Tarrance and Associates are \$14,800 for Iowa and \$16,390.24 for New Hampshire.

In response to the interim audit report, the Committee reduced the amount of Tarrance, Hill, Newport & Ryan's

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expenses allocated to Iowa and New Hampshire by \$7,519.67 and \$11,580.33 respectively. In addition, the Committee reduced the amount of Tarrance & Associates' expenses allocable to Iowa and New Hampshire by \$4,200 and \$4,500 respectively.

The Committee's response consists of a one page unsigned memorandum dated January 18, 1990, from Mr. Ed Goetas, President, Tarrance & Associates. The memorandum states that the "monthly retainer" (consulting fee) was to compensate Mr. Lance Tarrance who was approached early on in the campaign to be a part of Jack Kemp's overall strategy team beyond the traditional role of pollster. It states that there is no question that Mr. Tarrance's role was for the "big picture" rather than for the specific battles going on in the early primary states.

The memorandum goes on to address the issue of the focus groups. It states, that the focus groups were to help develop the overall media for the campaign by testing reactions to Jack Kemp on camera, potential campaign themes, and the impact of the social security issue. It states further that the focus groups were not conducted with voters in the early primary states.

The memorandum makes no mention of the \$4,500 payment dated February 24, 1988, for which no documentation was provided.

The Commission determined that the \$4,200 payment for the "focus group" and the \$19,100 in consulting fees are not allocable expenses. Accordingly, the Audit Staff revised the allocable amount to exclude the expenses. The Audit Staff's revised allocation amounts for Tarrance, Hill, Newport & Ryan are \$15,000 for Iowa and \$23,100 for New Hampshire. The revised Iowa allocation amount for Tarrance & Associates is \$10,600. For New Hampshire, the amount remains unchanged at \$16,390.24.

8. Possible "Testing-the-Waters" Expenditures

Section 9034.4(a)(2) of Title 11 of the Code of Federal Regulations states that even though incurred prior to the date an individual becomes a candidate, payments made for the purpose of determining whether an individual should become a candidate, such as those incurred in conducting a poll, shall be considered qualified campaign expenses if the individual subsequently becomes a candidate and shall count against the candidate's limits under 2 U.S.C. 441a(b).

Section 100.8(b)(1) of Title 11 of the Code of Federal Regulations states, in part, that the term "expenditure" does not include payments made solely for the purpose of determining whether an individual should become a candidate. If the individual subsequently becomes a candidate, the payments made are subject to the reporting requirements of the Act. Such expenditures must be reported with the first report filed by the

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principal campaign committee of the candidate, regardless of the date the payments were made.

Section 100.7(a) of Title 11 of the Code of Federal Regulations states that a contribution includes a gift, subscription, loan, advance or deposit of money or anything of value by any person for the purpose of influencing any election for Federal office. The term "anything of value" includes in-kind contributions.

Finally, Section 100.5(g) of Title 11 of the Code of Federal Regulations states that affiliated committees include all authorized committees of the same candidate and all committees established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons.

The Commission conducted an audit of the Campaign for Prosperity, a PAC with which the candidate was associated.

During the audit, a number of disbursements were identified as possible "testing the waters" expenditures made on behalf of Secretary Kemp's presidential campaign. The questionable expenditures include reimbursement for expenses incurred for travel to Iowa and New Hampshire by individuals who were subsequently involved in the presidential campaigns in those states. For example, a request for reimbursement by one of the individuals included a note in which the individual identifies himself as a "one man advance team". His expense report indicates travel to Des Moines and Council Bluffs from 11/24/86 through 11/26/86.*/ The purpose given is "Advance JK Travel to Iowa". In addition, a limited number of payments were also made to Iowa or New Hampshire vendors. For example, CFP paid a Holiday Inn in Manchester, New Hampshire for lodging for Congressman Kemp and a meeting room for a press conference held on 11/10/86. The audit of CFP covered a period beginning January 1, 1987.

In light of these kinds of activity, the Audit staff reviewed the 1986 CFP disclosure reports and noted a similar pattern of activity which appeared to be concentrated just prior to the establishment of the Committee. However, the reports give no indication as to the destination of the travel. The Audit staff determined that a review of the records related to that activity was necessary.

A request for the 1986 CFP records was made verbally during and after the audit fieldwork. Initially, the Treasurer appeared willing to comply with the request. He stated that he would retrieve the records from storage. Subsequently, the request was refused based on advice from the Committee's Counsel. Counsel wanted the request for the records including specifics to be made in writing.

*/ The Committee began its activity on November 24, 1986.

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In a letter dated June 1, 1989, the Audit staff requested that the Committee provide the 1986 CFP disbursement records for review. The Committee's Counsel responded by stating that the Audit staff failed to explain its legal basis for requesting the records. His position appeared to depend on the audit notification letter for the 2 U.S.C. 438(b) audit of CFP which specified an audit period beginning January 1, 1987. Counsel stated that without further legal justification, CFP would not make the 1986 records available.

While it is true that the Audit notification letter for CFP specified an audit period beginning January 1, 1987, it also stated that certain records and other documents dated outside the audit period may be requested if they relate to activity during the audit period. In addition, the Audit staff's request cited the Title 26 audit provisions as well as the candidate agreements and definition of "qualified campaign expenses".

Given the above, the Audit staff was of the opinion that a review of CFP 1986 disbursement records was necessary to determine if any presidential campaign activity was conducted by CFP.

The Treasurer of CFP is Mr. Scott Mackenzie.

In the interim audit report, the Audit staff recommended that the Committee provide the 1986 CFP disbursement records, including copies of invoices, bank statements, canceled checks, debit and credit advices and any other documents related to the expenditures. The Committee was encouraged to provide any explanation which it believed would clarify the nature of the disbursements.

In response to the interim audit report, the Committee objected to the request to provide the records. The Committee submitted that the request exceeded the Audit staff's authority under the Presidential Primary Matching Payment Fund Act, and the Commission's regulations, and that the Committee had no obligation under provisions of the Act, the Candidate Agreement or the Commission's regulations to provide the Audit staff with CFP records. The Committee stated further that the Audit staff had provided no legal basis for requesting the Committee to produce the records from a separate multicandidate committee.

The Committee cited 11 CFR §9033.1(b)(5) which states in part that the candidate and the candidate's authorized committee will keep and furnish to the Commission all documentation relating to disbursements and receipts. The Committee stated that CFP was not an authorized committee of Jack Kemp, nor an affiliated committee and its disbursements did not fall within the scope of the audit provision of Title 26.

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In a separate letter dated February 12, 1990, Counsel for the Committee responded on behalf of CFP. That response also objected to the request for 1986 CFP records.

On September 21, 1990 the Commission issued subpoenas to both the Committee and CFP which required the production of any and all records, receipts and other documentation associated with disbursements made by Campaign for Prosperity (CFP) which relate in any way to Iowa or New Hampshire from January 1, 1986 through December 31, 1986, including:

1. Bank statements, canceled checks, debit and credit memoranda, invoices and accounting records, and
2. All documents which relate to appearances made by Congressman Jack Kemp in Iowa and New Hampshire which include but are not limited to invitations, hand-outs, press releases, fliers, transcripts, speeches and itineraries.

In response to the subpoena, the Committee submitted copies of CFP documents which cover the period 1/1/86 through 12/31/86. The documents included copies of invoices, expense reports, expense authorization requests, itineraries, and contemporaneous memoranda which relate to either Iowa or New Hampshire. Not included were bank statements, canceled checks, invitations, hand-outs, press releases, speeches or transcripts.

Campaign for Prosperity*/ registered with the Commission on April 22, 1976. A review of reported receipts, disbursements and year end cash on hand for each year from 1976 through 1988 indicates a significant increase in activity in 1986. A review of 1986 reported activity shows that only 7.4% of CFP's disbursements were contributions to candidates, with more than a quarter of that contributed to Iowa and New Hampshire candidates.

An analysis of 1986 reported activity indicated an increase in receipts and disbursements for the reporting period beginning September 1, 1986 through November 24, 1986. Documentation submitted by the Committee suggests that the Candidate and other CFP staff were engaged in various activities during that time and earlier in the year which indicate the existence of a "testing-the waters" campaign by CFP on behalf of Jack Kemp for President:

*/ Campaign for Prosperity registered with the Commission in 1976 as the "Committee for Economic Strength." It changed its name to "Committee to Rebuild American Incentive" in 1979 and to "Campaign for Prosperity" in 1982. In 1988, Campaign for Prosperity changed to its current name, "Campaign for a New Majority."

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1. Iowa

° During June, a CFP staff person incurred travel expenses in Iowa to make advance arrangements for the Candidate who apparently traveled to Iowa June 23, 1986. In addition, CFP apparently had a local representative assisting with the arrangements. The expenses paid by CFP indicate that a luncheon and press conference were held in Des Moines.

° In July, the Candidate again traveled to Iowa. The trip, which took place from July 9, through July 11, 1986, began in Des Moines and included stops in Ames, Vinton, and Osage, IA and then went on to Niles and Grand Rapids, MI. According to the trip itinerary, the Candidate attended receptions, breakfasts, dinners, and fundraisers for Iowa candidates. At the events the Candidate gave remarks and made himself available to the press including a live television interview. In addition, the Candidate made a bus trip from Des Moines to a park in Ames, IA. for an Ice Cream Social at which he spoke. The itinerary for the trip indicates that two buses were used, one with "AMWAY PEOPLE" and one with "RIGHT TO LIFE PEOPLE". The itinerary states that the "EVENT SCHEME IS 'BUS-RIDE WITH JACK KEMP'" (emphasis in original). Finally the itinerary notes that the Candidate would be available to the press before boarding the bus and that a Des Moines media person may be on the trip, however no mention of any other candidate is made.

° At the end of July, CFP staff incurred travel expenses in Iowa apparently to advance the Candidate's trip of August 1st and 2nd. This trip included stops in Des Moines, Sioux City, Waterloo, Cedar Rapids, and Iowa City. The Candidate's itinerary includes the following: Des Moines businessmen's breakfast, a press conference to support Fred Grandy and to address agricultural issues, Greater Sioux Land Chamber of Commerce luncheon, meeting with "area politicians", interview with Waterloo Courier, Blackhawk County Republican Leaders meeting, Shriners cocktail reception, Blackhawk County Conservative Leaders meeting, Iowa East/West High School Football Banquet, meeting with Linn County GOP Leaders, interview with Cedar Rapids Gazette reporter, Johnson and Cedar County Grassroots Workers meeting, and Johnson County Ice Cream Social. The itinerary also notes that the press was to be invited to a number of these events.

° In mid August a CFP staff person made a trip to Iowa and the Candidate apparently visited Dubuque 10 days later. No information about these trips was provided.

° In late September, two CFP staff persons incurred travel expenses in Iowa from 9/15-9/24/86. Their travel included Des Moines, Cedar Rapids, and Davenport. No indication is given as to the purpose of the travel.

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° In late October, it appears that the Candidate and three others traveled to Des Moines to meet with the Polk County Republican Party. Campaign For Prosperity paid for the Candidate's lodging, however no information was provided about the Candidate's transportation or the expenses of the other CFP staff who apparently accompanied the Candidate.

° On November 25, 1986 the Candidate arrived in Des Moines, IA where, according to an itinerary, he met with the IA Farm Bureau Federation Executive Board, and the IA Association of Business and Industry. In addition, he was interviewed by reporters from the Des Moines Register, KCCI TV/Radio, WHO Radio, and the president of the Iowa Newspaper Association. He also attended a "JK rally-dinner." The following day he continued with an Iowa Resources (PAC) Luncheon and an interview with Tribune Radio Network (40 affiliates in 5 states). It should be noted that Jack Kemp for President reports its initial activity as beginning on November 24, 1986.

The expenses related to the events discussed above total \$26,283.51 of which \$7,714.16 would be allocable to the Iowa spending limitation. No attempt was made to apply the five day rule at 11 CFR §106.2(b)(2)(iii) given that these individuals were not employees of the Committee.

In addition to the travel and event expenses noted above, available records document other miscellaneous expenses related to Iowa. These total \$2,251.40 for mailing lists, mailing services, and related copying. These amounts would be allocable to the Iowa spending limitation.

2. New Hampshire

° Between February and May, 1986, a CFP consultant made at least two trips to New Hampshire. Expenses included rental cars, lodging and subsistence, and in one case a meeting room. Also in one case the Candidate appears to have been on the same trip. The documentation provided does not establish the purpose of this travel.

° In June, the Candidate attended an event in Hampton, New Hampshire related to Congressional candidate Bob Smith.

° In mid-September, CFP staff incurred travel expenses to advance the Candidate's September 18th through 19th trip to Keene and Newport, NH. According to the trip itinerary, the Candidate attended a dinner for the Cheshire County Republican Women's Club, the Cheshire County Republican Leadership Coffee Hour, and a Sullivan County Republican Party Luncheon. In addition, he was interviewed by at least three radio stations, scheduled press availability at his hotel were television coverage was expected, and met with reporters from the New York Times and

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Time in route to the airport. A briefing memo attached to the Candidate's itinerary makes the following observations with respect to some of these activities:

"Cheshire County Republican Women's Club Dinner"

"As you are probably aware there was some movement by the Bush people to cancel the dinner. The Bush people claimed that State Representative Helen Burley, who is the President of the Cheshire County Women's Club, was going against the by-laws by featuring a candidate for 1988 and showing favoritism in a primary. Helen claimed that you are not a candidate, and are only here to assist the Women's Republican Club in raising money."

Later the same section of the memorandum states:

"Most of the people in the room are uncommitted for 1988 and will be paying a great deal of attention to what you will be saying. They will be looking for a strong upbeat Republican speech with an overview of National issues."

"FRIDAY 9/19 SULLIVAN COUNTY REPUBLICAN LUNCHEON"

"Something that you need to be aware of is that Vice-President Bush is having a big barb-b-que on Sunday and most of the people in the room will be attending. Your presentation will make a strong impression, and will still be fresh in their minds when they see the Vice-President on Sunday."

° From October 5 through 8 a CFP staff person traveled to New Hampshire for the state convention as well as Vermont and Massachusetts political meetings. The travel records indicate that boxes of printed material were shipped as part of this trip. No further information was provided.

° On November 10, 1986, the Candidate and others traveled to Manchester, New Hampshire where the Candidate addressed New Hampshire Bar Association at a luncheon (500 in attendance) and held a press conference. No evidence was provided to conclude that the Candidate's speech or subsequent press conference was not a testing the waters activity.

The expenses identified relating to these events total \$4,264.34 of which \$2,752.34 would be allocable to the New Hampshire spending limitation.

In addition to the events and travel noted above, CFP incurred miscellaneous expenses for New Hampshire totaling \$770.33. These expenses were for printing and mailing services.

The events discussed above indicate that CFP engaged in activities in Iowa and New Hampshire during 1986 which may have been for the purpose of advancing Congressman Kemp's candidacy for the office of President. Associated expenses for Iowa total

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\$28,525.91 of which \$9,965.56 is allocable to the Iowa spending limitation. For New Hampshire the total would be \$5,034.67 of which \$3,522.67 is allocable to the spending limitation.

The Commission discussed a similar issue with respect to another 1988 Presidential candidate. In that case the Commission concluded, that with limited exception, the number, type, and amount of expenditures made by a political action committee associated with that candidate for events in Iowa and New Hampshire did not constitute testing the waters activity. The activities funded by CFP described above were compared to those considered in the earlier case. Based on that comparison, the Audit staff concludes that the following events and disbursements are testing the waters.

° The Candidate's trip to Des Moines on November 25, 1986 (associated costs - \$688.20, all of which is allocable to the Iowa spending limitation);

° The Candidate's trip to New Hampshire in September, 1986 (associated costs - \$1592.87, of which \$876.37 is allocable to the New Hampshire spending limitation); and

° The Candidate's trip to Manchester, New Hampshire on November 10, 1986 (associated costs - \$217.19, all of which is allocable to the New Hampshire spending limitation).

The itineraries for these trips as well as a briefing memorandum included in documentation submitted by the Committee provide evidence that Congressman Kemp was engaged in testing the waters activities.

Therefore, the Audit staff concludes that expenses associated with these events (\$2,498.26) should be considered to be in-kind contributions to Jack Kemp for President Committee* and the amount \$688.20 is allocable to the Iowa spending limitation and \$1,093.56 is allocable to the New Hampshire spending limitation.

9. Refunds and Rebates

The Committee reconstructed allocation figures for Iowa contain an offset of \$3,753.38. The Audit staff reviewed these refunds and reduced the offset by a net amount of \$1,123.04. This reduction is the result of the Committee having included refunds at their full amount when some payments to the various vendors had been allocated to the expenditure limitation net of compliance and fundraising exemptions or had required only partial

*/ CFP made no direct contributions to Jack Kemp for President. The costs associated with the testing the waters activity fall below CFP's \$5,000 contribution limitation.

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allocation to the state (i.e., intra- vs. inter-state telephone service) and one refund received after the Committee prepared their allocation figures.

In their response to the interim audit report, the Committee shows refunds credited to Iowa of \$7,958.59 and to New Hampshire of \$6,243.58. For Iowa, the refund list includes the same items considered in the interim report plus additional items. For New Hampshire, no offsets were included in the interim report.

Like the items discussed in the interim audit report, the Committee made no adjustment for refunds of disbursements which were not charged to spending limitations at their full amount (i.e., compliance and fundraising exemptions on overhead expenses and telephone refunds where a portion of the payments to the vendor represent interstate long distance service). The Audit staff adjusted the refund amounts accordingly.

In addition, some of the refunds appear to relate to expenditures which were not charged to the State spending limitation and hence may not be credited to the limitation. For another group of refunds, the committee submitted inadequate documentation to allow a determination as to how the original amount was charged. Included in this group are telephone refunds where the check copy submitted does not identify an account number. Without an account number, there is no way to tell to which State the refunds should be credited. Also included are refunds from the Committee's media firm. The response does not include a copy of the refund check or how the Iowa and New Hampshire amounts were determined. No adjustment has been made for these refunds.

The Audit staff has determined that a credit of \$3,746.46 should be allowed for Iowa refunds and a credit of \$1,140.18 for New Hampshire refunds.

10. Recap of Allocable Amounts

Presented below is a recap of amounts allocable to the Iowa and New Hampshire spending limitations. Shown are the Committee's original allocations, the revised allocations contained in the response to the interim audit report, and the Audit allocations.

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Iowa

	Committee's Original Allocation	Committee's Allocation in Response to Interim Audit Report	Audit Staff's Allocation
Media	\$275,727.37	\$274,959.52	\$276,234.52
Personnel	107,761.88	108,618.43	108,618.43
Vendors	86,308.93	120,176.20	142,195.09
State Account	11,543.73	11,543.73	15,231.25
Travel			
American Express	3,489.38	1,664.50	4,002.38
Chartered Aircraft	10,000.00	-0-	-0-
National Staff	17,351.63	9,034.42	38,371.79
National Staff Payroll	7,678.21	5,415.15	24,268.39
Voter Contact			
Voter Contact Services	39,428.48	37,815.92	37,815.92
Long River Communications	39,821.00	39,821.00	46,321.00
Haughton & Co.	65,943.81	67,243.12	72,254.69
Anne Stone & Assoc.	57,150.57	55,545.51	59,861.55
Postage	10,000.00	53,257.35	42,180.90
Polling			
Tarrance & Assoc.	10,600.00	10,600.00	10,600.00
Tarrance, Hill, Newport & Ryan	15,000.00	15,000.00	15,000.00
Testing-the-Waters	-0-	-0-	688.20
Refunds	<u>(3,753.88)</u>	<u>(7,958.59)</u>	<u>(3,746.46)</u>
Total Allocable Amount	754,051.11	802,736.26	889,897.65
Less Expenditure Limitation	<u>(755,217.60)</u>	<u>(775,217.60)</u>	<u>(775,217.60)</u>
Amount in Excess of the Spending Limitation	<u>-0-</u>	<u>\$ 27,518.66</u>	<u>114,680.05</u>

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New Hampshire

	Committee's Original Allocation	Committee's Allocation in Response to Interim Audit Report	Audit Staff's Allocation
Media	\$153,568.47	\$160,359.00	167,189.65
Personnel	41,631.65	39,392.31	39,317.15
Vendors	80,841.14	92,982.18	112,336.00
State Account	10,470.56	10,730.95	10,730.95
Travel			
American Express	8,423.14	670.00	8,423.14
National Staff	4,375.01	14,250.06	14,250.06
National Staff Payroll	-0-	3,119.06	3,119.06
Voter Contact			
Upper Valley Press	51,789.00	51,789.00	51,789.00
Voter Contact Services	-0-	15,548.40	15,548.40
Haughton & Co.	16,676.55	10,693.61	13,334.64
Anne Stone & Assoc.	37,599.44	36,316.47	38,982.90
Postage	20,455.73	20,455.73	20,455.73
Polling			
Tarrance & Assoc.	11,890.24	11,890.24	16,390.24
Tarrance, Hill, Newport & Ryan	23,100.00	23,100.00	23,100.00
Testing- the -Waters	-0-	-0-	1,093.56
Refunds	<u>-0-</u>	<u>(6,243.58)</u>	<u>(1,140.18)</u>
Total Allocable Amount	460,820.93	485,053.43	535,920.30
Less Expenditure Limitation	<u>(461,000.00)</u>	<u>(461,000.00)</u>	<u>(461,000.00)</u>
Amount in Excess of the Spending Limitation	<u>-0-</u>	<u>\$ 24,053.43</u>	<u>73,920.30</u>

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Recommendation #5

The Audit staff recommends that the Commission make an initial determination that \$60,258.69 (\$114,680.05 + 73,920.30 - 188,600.35 x .319502) be paid to the United States Treasury pursuant to 11 C.F.R. §9038.2(b)(2).

D. Stale Dated Committee Checks

Section 9038.6 of Title 11 of the Code of Federal Regulations states that if the Committee has checks outstanding to creditors or contributors that have not been cashed, the Committee shall notify the Commission of its efforts to locate the payees, if such efforts are necessary, and to encourage them to cash the outstanding checks. The Committee shall also submit a check for the total amount of such outstanding checks, payable to the United States Treasury.

The Audit staff reconciled the Committee's reported activity to its bank activity through August 31, 1988 and determined that the total amount of outstanding checks was \$139,571.99. A review of the Committee's bank statements for the period 9/1/88-9/30/88 indicated that outstanding checks in the amount of \$72,625.19 were paid during the period leaving a balance of \$66,946.80 in outstanding checks.

On March 9, 1989, the Committee presented additional bank documentation for the period October 1, 1988 through February 28, 1989 which indicated that \$7,291.02 of the outstanding checks noted above cleared during that period. In addition, \$16,629 in checks written during the period September 1, 1988 through February 28, 1989 remained outstanding at February 28, 1989, leaving a balance in outstanding checks at that date of \$76,284.78 (\$66,946.80 - \$7,291.02 + \$16,629.00).

In the interim audit report, the Audit staff recommended that the Committee present evidence that:

- a) the checks are not outstanding (i.e., copies of the front and back of the negotiated checks); or
- b) the outstanding checks are void (copies of the voided checks with evidence that no committee obligation exists, or copies of negotiated replacement checks); and
- c) the Committee attempted to locate the payees to encourage them to cash the outstanding checks.

The Committee's response to the interim audit report did not address this finding. However, in response to other findings contained in the interim report, the Committee submitted documentation for contribution refunds made through 9/20/89. The Audit staff used this information to determine a

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revised outstanding check amount for the Committee's contribution account. The Committee submitted no documentation which would allow the Audit staff to revise the total for outstanding checks from other Committee accounts.

Based on the available information, the Audit staff determined that as of 10/30/89, the total amount of outstanding checks is \$126,810.66.

It should be noted that the Audit staff reviewed the Committee's disclosure reports for the period 7/1/89 - 9/30/89 and identified \$51,288.38 in stale-dated checks which were replaced with other Committee checks. Should the Committee present copies of the negotiated replacement checks, the total amount of outstanding checks will be revised accordingly.

Recommendation #6

The Audit staff recommends that the Commission make an initial determination that \$126,810.66 be paid to the United States Treasury pursuant to 11 C.F.R. 9038.6.

E. Requests for Additional Information

Section 9033.1(b)(5) of Title 11 of the Code of Federal Regulations states, in part, that the candidate and the candidate's authorized committee(s) will keep and furnish to the Commission all documentation relating to disbursements and receipts including any books, records (including bank records for all accounts), all documentation required by this section including those required to be maintained under 11 C.F.R. §9033.11 and other information that the Commission may request.

In addition, Section 106.2(a)(1) states that unless specifically exempt, all qualified campaign expenses made for the purpose of influencing the nomination of a candidate with respect to a particular state must be allocated to that state and subject to the state expenditure limitation.

1. Collateral Material Shipped to States

The Audit staff included in the amounts allocable to the states of Iowa and New Hampshire, payments to United Parcel Services (UPS) for shipments of campaign materials to Iowa and New Hampshire (Iowa \$1,802.19; New Hampshire \$1,275.52). However, the Audit staff was unable to associate the shipping costs with the cost of the materials shipped. These shipping costs suggest that the cost of these campaign materials may be allocable to state expenditure limitations.

The Committee was provided with copies of documents from the UPS vendor file which may indicate additional allocable amounts.

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The interim audit report recommended that the Committee provide information to permit shipping costs to be associated with the cost of the materials shipped.

In their response to the interim audit report, the Committee states that they find the request unreasonable. They go on to say that their records do not associate material shipped with the shipping costs and that the person responsible does not recall the nature of the material shipped.

Finally, the response contends that the Audit staff has not shown any need for the information requested or that the shipping costs cannot reasonably be explained as the consequence of shipping the amount of campaign materials now allocated.

The reason for the request is clear. The shipping charges relate to Iowa and New Hampshire where the Committee has exceeded the spending limitations. Without any record as to material shipped, establishing with any certainty that current allocations are adequate to explain the shipping costs is not possible and thus the request.

It is noted that the Committee's computerized disbursement system shows the purchase of \$75,710.77 in collateral materials. None are coded for allocation to any state. The Audit report has included \$10,189.11 of this amount in Iowa and New Hampshire, however, \$4,318.90 of that amount was shipped to those states by the vendor and therefore, no shipping charges for this material is included in the shipping costs questioned. The remaining \$65,521.66 in purchases of collateral materials remains with no indication in the Committee's data base of any State allocation. Similarly, the Committee's computer system under Printing and Stationery includes \$87,554.10 excluding expense reimbursements, purchases described as office supplies, forms printing, and purchases from vendors where the allocation is to the same state as the vendors' address. The amount coded or otherwise allocated to any state is \$1,648.65 leaving \$85,905.45 in printing not coded to any State. The amount is coded to the administration cost center.

Though the Audit staff can accept the Committee's representation that they are unable to associate shipping costs with the material shipped, the question posed by the interim audit report remains unresolved. As a result, the Audit staff is also unable to determine a dollar amount of any potential State allocation. It would therefore appear that Committee records are not adequate to allow Committee allocations to be verified.

Recommendation #7

Based on the fact that the Committee and Audit Staff agree that there is no available documentation which could be used to allocate the costs of the materials shipped, and the absence of

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specific regulatory requirements, the Audit Staff recommends no further action on the matter.

2. Printing Costs Associated with Postage Expenses

Similar to United Parcel Service discussed above, the Audit staff identified payments to the United States Postal Service which indicate that mailings were made to Iowa and New Hampshire. In some cases the post offices receiving the payments were in either Iowa or New Hampshire and in other cases the post offices were in the Washington metropolitan area. The postage costs have been allocated to Iowa and New Hampshire. However, in many cases the cost of the mailings cannot be associated with the postage expense to determine if the proper allocation of printing and other costs have been made.

At the exit conference the Committee was provided a list showing the check number and date of the payments. These payments total \$41,284.87 for Iowa and \$19,493.73 for New Hampshire.

During the analysis of the Committee's response to Finding II. D.6.e. (Postage) of the interim audit report, it was noted that the postage allocation should be reduced by \$11,076.45. A similar reduction should be made here leaving the Iowa amount at \$30,208.42 and the New Hampshire amount unchanged at \$19,493.73.

In the interim audit report, it was recommended that the Committee provide documentation establishing the costs associated with these postage expenses and that such documentation should contain sufficient detail to permit a determination as to the need for allocation to a state.

In their response to the interim audit report, the Committee states that in their opinion, the request is unreasonable. The response goes on to say that "JKFP's expense records do not, in most cases, relate postage expenses to the materials mailed. Some of the post offices that received payments for postage were located in Iowa or New Hampshire and some were located in Washington, DC. Postage expenses incurred at post offices in Iowa and New Hampshire included any number of items including payment of rent, utility bills, responses to inquiries and flyers, circulars, and letters produced by the in-house printing and duplicating capacity of the local offices. To require JKFP to try to reconstruct this information now from non-documentary sources, long after the event, would impose a very substantial, if not impossible, burden on the committee.

"Moreover, the Audit staff has not shown any need for the information it has requested. It has not shown, or even pointed to any evidence tending to show, that the amount of printing and other costs associated with mailings that are presently allocated to Iowa and New Hampshire, plus the ordinary and usual business mailings of the Iowa and New Hampshire offices,

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would not justify the amount of the postage expenses the Audit staff has now allocated to Iowa and New Hampshire.

"JKFP has reviewed the records of its allocation of printing and other costs associated with mailings to Iowa and New Hampshire, which show that the costs now allocated to those States are fully consistent with the amount of postal expenses now allocated by the Audit Division to Iowa and New Hampshire."

The Audit staff believes that the need for the requested information is obvious. The postage costs relate to mailings to Iowa and New Hampshire. The Committee has exceeded the spending limitation in both States and as the interim audit report recommendation states, the response should contain sufficient detail to permit a determination as to the need for allocation to States.

The Committee also notes that the postage paid to Post Offices in the States may relate to mailing of items produced in State offices as well as normal business correspondence. The staff acknowledges that some postage may have been so used. However, it is also noted that the Committee maintained checking accounts in both Iowa and New Hampshire and no amounts paid for postage from these local accounts is included in the postage costs questioned. Though in New Hampshire such payments amount to only \$106.28, in Iowa where the questioned amount was largest, the local postage expenses were \$2,703.60. Also, the interim audit report figures do not include reimbursements to individuals in the States for postage. In the Committee's computer file, under the heading of political mail, is a reimbursement to an individual in New Hampshire for \$1,500.00.

The Audit staff also reviewed the transactions included in the Committee's computer system and coded "Political Mail", the same coding as the majority of the postage charges in question. After deleting payments to the postmaster, expense reimbursements, list rental, computer services and other expenses which did not appear to directly relate to cost of material mailed, the total was \$444,880.68. Of this amount, \$235,891.43 was allocated by Audit or the Committee to Iowa and New Hampshire and \$57,023.84 to all other states. Of the Iowa and New Hampshire amount, \$62,891.43 was paid for postage to various vendors other than the post office and \$45,468.69 was paid to a vendor for various work, much of which appears to be computer services rather than the actual preparation of material for mailing.

The remaining \$152,639.23 is not allocated to any state. According to the Committee's computer file only \$4,346.50 of this amount, is for postage. Thus, \$148,292.73 in political mail costs remain which are not associated to any state.

Also relevant to the analysis may be a portion, \$85,903.45, in printing and stationery costs not coded to any state discussed in Section 2 above.

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Although the Audit staff can accept that in most cases Committee records do not relate postage expense to materials mailed, the question raised in the interim audit report remains unresolved. As a result, the Audit staff is unable to determine the dollar amount of any potential State allocation.

Finally, the Committee states that it has reviewed its allocations of printing and other costs associated with mailing to Iowa and New Hampshire and concludes that the allocations to those States are fully consistent with the amount of postal expense now allocated. However, nothing to support this conclusion or any analysis was submitted with the response.

Recommendation #8

Based on the fact that the Committee and Audit Staff agree that there is no available documentation which could be used to allocate the costs of the materials mailed, and the absence of specific regulatory requirements, the Audit Staff recommends no further action on the matter.

3. Payment to Thomas Kemp

The Audit staff noted that Mr. Thomas Kemp received a payment from the Committee in the amount of \$5,652.45 on June 2, 1988. The Committee presented no documentation in support of the payment to Mr. Kemp nor was any portion of it allocated to either Iowa or New Hampshire. The Audit staff noted that for a period of time immediately preceding the New Hampshire primary, Mr. Kemp incurred Iowa and New Hampshire allocable expenses for which he was reimbursed on June 15, 1988. Based on this information, the Audit staff believes that the amount of \$5,652.45 or a portion thereof may be allocable to Iowa and/or New Hampshire.

In the interim audit report, the Audit staff recommended that the Committee provide documentation in support of the \$5,652.45 payment. In response, the Committee submitted a statement signed by the Committee Treasurer which states that the committee received and paid an invoice from Mr. Thomas Kemp for general secretarial services provided to Mr. Kemp in California with respect to campaign-related matters.

In the Audit staff's opinion the Committee had not complied with the recommendation of the interim report since the statement provided by the Committee was not sufficient for making a determination as to whether any amount of the \$5652.45 payment is allocable to Iowa or New Hampshire and a copy of the invoice referenced in the statement was not included in the response.

Therefore, on September 21, 1990 the Commission issued a subpoena which required that the Committee provide copies of all records, receipts and other documentation pertaining to the

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services provided by Thomas Kemp for which he received payments on June 2 and 15, 1988.

In response to the subpoena, the Committee submitted an expense report from T. P. Kemp which details the billing time spent by Thomas Kemp's secretary on the Jack Kemp for President campaign. The expense report (dated 1/27/88) covers the the period April 1987 through December 1987 and indicates that 343 hours were billed at \$16.00 per hour (\$5,488.00) plus \$164.45 for postage. Though a small portion of the billing indicates that it is Iowa related and possibly allocable, the amount is immaterial.

Recommendation # 9

The Audit staff recommends no further action on this matter.

4. Decoy House Real Estate

The Committee's allocations to New Hampshire include a \$250 payment to Decoy House Real Estate. According to a document in the Committee's file, the payment was related to the rental of a house in New Hampshire for 6 weeks at a cost of \$125.00 per week. The payment, which was subsequently voided, was dated 12/28/87. The file contained no other documentation with regard to the house.

Presumably, the house was to lodge campaign workers during the weeks preceding the New Hampshire primary. If the house was used for such purpose, the rental cost and any expenses associated with its use (such as utilities, telephone, furniture rental, etc.) may be allocable to New Hampshire as well as any previously unallocated personal expenses of the campaign staff lodged there.

In the interim audit report, the Audit staff recommended that the Committee provide information with respect to the house rental, including but not limited to: the time period the house was used by the campaign, any costs associated with its use and the number of people lodged there along with the time periods they were lodged.

In response to the interim audit report, the Committee submitted an affidavit prepared by the Committee Treasurer and signed by an agent of Decoy House Real Estate which attests to the following: 1) The agent was responsible for leasing a house to the Committee. 2) The term of the lease agreement was six weeks at a rate of \$125 per week. 3) The Committee paid \$250 for the first two weeks and at the conclusion of that period terminated the agreement because the house was too far away from the Campaign Office.

In addition, the Committee states that the check making the initial payment was subsequently voided and believed to be

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Kemp/Dannemeyer Committee was provided with a schedule of the contributions at the exit conference.

The Audit staff found evidence of neither separate account for the deposit of contributions which were possibly excessive or prohibited, nor a method to monitor an amount required to be kept in K/D's accounts while the acceptability determination was being made.

The Audit staff recommended that the Kemp/Dannemeyer Committee submit evidence demonstrating that the remaining contribution was not received from a corporation, or refund the remaining corporate contribution and present evidence of the refund (copy of the front and back of the negotiated refund check).

In response to the recommendation, the Committee submitted an undated letter from the contributor stating that the contribution represented his personal funds and the account on which the contribution is drawn is not maintained or controlled by an incorporated entity. As a result, a conflict exists between the information submitted by the contributor and information obtained from the Secretary of State of California.

Recommendation #11

Generally, the Audit staff depends upon the information obtained from the independent party and considers the statement from the contributor to be a mitigating factor. However, given the small number and amount of the contributions in question the Audit staff recommends no further action with regard to this matter.

V. Victory '88 - Audit Findings and Recommendations

Matters Referred to the Office of General Counsel

Other matters noted during the audit have been referred to the Commission's Office of General Counsel.

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reissued. However, a copy of that check has not been located and may not have been issued.

In light of the information supplied and the small amount of the payment involved, the Audit staff accepts the Committee's explanation.

Recommendation #10

The Audit staff recommends no further action in this matter.

IV. The Kemp/Dannemeyer Committee - Audit Findings and Recommendations

Prohibited Contributions

Under Section 441b(a) of Title 2 of the United States Code, it is unlawful for any corporation to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the forgoing offices, or for any candidate, political committee or other person knowingly to accept or receive any contribution prohibited by this section.

Section 103.3(b)(1) states that, contributions that present genuine questions as to whether they were made by corporations may be, within ten days of the Treasurer's receipt, either deposited into a campaign depository or returned to the contributor. If any such contribution is deposited, the Treasurer shall make his or her best efforts to determine the legality of the contribution. If the contribution cannot be determined to be legal, the Treasurer shall, within thirty days of the Treasurer's receipt of the contribution, refund the contribution to the contributor.

Section 103.3(b)(4) states that any contribution which appears to be illegal and which is deposited into a campaign depository shall not be used for any disbursements by the political committee until the contribution has been determined to be legal. The political committee must either establish a separate account in a campaign depository for such contributions or maintain sufficient funds to make all such refunds.

During the period audited, K/D received two contributions from two corporations totaling \$750.00*/. One of the contributions for \$500 was refunded seven months after its receipt. The

*/ The Audit staff contacted the appropriate Secretary of State's office to verify the corporate status of the two entities.

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Congressman Jack Kemp)
and the Jack Kemp for)
President Committee,)
Final Repayment Determination)

STATEMENT OF REASONS

On June 11, 1992, the Commission made a final determination that Congressman Jack Kemp and the Jack Kemp for President Committee, Inc. (the "Committee") must repay \$103,555.03 to the United States Treasury. This repayment represents repayment determinations in the amount of: (1) \$54,253.13, the pro rata amount of expenditures in excess of the state expenditure limitations; and (2) \$49,301.90 for stale-dated Committee checks. Therefore, the Committee is ordered to repay this amount within 30 days of receipt of this determination pursuant to 11 C.F.R. § 9038.2(d)(2). This Statement sets forth the legal and factual basis for the Commission's determination in accordance with 11 C.F.R. § 9038.2(c)(4).^{1/}

I. BACKGROUND

The Jack Kemp for President Committee (the "Committee") is the principal campaign committee of Congressman Jack Kemp, a candidate for the Republican presidential nomination in 1988. On July 25, 1991, the Commission made an initial determination

^{1/} Throughout the Statement of Reasons, "FECA" refers to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, and "Matching Payment Act" refers to the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042.

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that the Committee repay \$187,069.35 to the United States Treasury. This repayment represented determinations in the amount of: (1) \$60,258.69 for expenditures in excess of the state limitations; and (2) \$126,810.66 for stale-dated Committee checks. The issues relevant to the repayment determination first arose in the Interim Audit Report on the Jack Kemp for President Committee, and the Kemp/Dannemeyer and Victory '88 Joint Fundraising Committees (the "Committees") which was approved on August 25, 1989. Attachment 1. The Committees responded to the Interim Audit Report on February 7, 1990. Attachment 2.

On September 18, 1990, the Commission authorized the issuance of subpoenas to the Committee and other entities concerning possible testing the waters expenditures by Campaign for Prosperity ("CFP"), and certain Committee expenditures. On October 12, 1990, counsel to the Kemp Committee and CFP submitted motions to quash the subpoenas. The Commission denied the motion to quash the subpoenas on October 31, 1990. The Office of General Counsel received and forwarded to the Audit Division the last of the responses to the subpoenas on December 18, 1990.

The Commission issued the Final Audit Report on July 25, 1991. Attachment 3. The Committee submitted its response to

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the Final Audit Report on November 1, 1991.^{2/} Attachment 4. In its response, the Committee requested the opportunity to address the Commission in open session regarding the Final Audit Report and the initial repayment determination. On November 21, 1991, the Commission granted the Committee's request for an oral presentation. Counsel for the Committee made an oral presentation before the Commission on December 10, 1991. Attachment 5. The Committee submitted additional information on December 23, 1991. Attachment 6. The Commission's Audit Division submitted memoranda concerning the Committee's responses to the Office of General Counsel on December 5, 1991, January 8, 1992, and March 30, 1992. Attachments 7, 8, and 9.

II. EXPENDITURES IN EXCESS OF THE STATE LIMITATIONS

The FECA establishes state expenditure limitations for candidates seeking the presidential nomination who receive public financing. 2 U.S.C. § 441a(b)(1)(A). The Commission's regulations, at 11 C.F.R. § 106.2, govern the allocation of expenditures by publicly-financed primary candidates to particular states. Generally, expenditures incurred by a candidate's authorized committee for the purpose of influencing the nomination of that candidate with respect to a particular state must be allocated to that state on a reasonable basis. 11 C.F.R. § 106.2(a)(1).

^{2/} On August 21, 1991, the Commission granted the Committees an extension of time until October 15, 1991 to respond to the initial repayment determination. The Commission granted a second extension of time, until November 1, 1991, to the Committees on October 17, 1991.

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The Final Audit Report included a number of findings concerning the allocation of expenditures to the Committee's Iowa and New Hampshire state expenditure limitations. The Iowa state expenditure limitation for the 1988 election was \$775,217.60 and the New Hampshire state expenditure limitation was \$461,000. The Committee exceeded its Iowa state expenditure limitation by \$114,680.05 and its New Hampshire state expenditure limitation by \$73,920.30. The Committee's repayment ratio for non-qualified campaign expenses is 31.9502%. Therefore, the Commission made an initial determination that the Committee must repay \$60,258.69, a pro rata portion of \$188,600.35, the total amount of expenditures in excess of the state limitations. 26 U.S.C. § 9038(b)(2) and 11 C.F.R. § 9038.2(b)(2).

The Committee contests the allocation of the following categories of expenses to the state expenditure limitations: (1) apparent \$1,000 mathematical overstatement; (2) media allocations and refunds; (3) travel expenses - press reimbursements; (4) American Express; (5) voter contact services; (6) postage; (7) polling; (8) refunds and rebates; and (9) testing the waters expenditures.

A. MATHEMATICAL OVERSTATEMENT

The Committee states that the Final Audit Report includes a \$1,000 mathematical overstatement of the total amount allocable to the New Hampshire state expenditure limitation. The Commission notes that the Final Audit Report contains a typographical error on page 43. The total figure in the column

labeled "Audit Staff's Allocation" should be \$534,920.30, rather than \$535,920.30. While the printed total was incorrect, the correct amount was used to calculate the amount in excess of the limitation, \$73,920.30. Attachment 7, page 1. Therefore, no adjustment is necessary.

B. MEDIA ALLOCATION AND REFUNDS

The Committee incurred expenses related to radio time on 21 radio stations allocable to the New Hampshire state expenditure limitation. In response to the Final Audit Report, the Committee proposes a \$1,499.53 reduction in the allocation of radio time to New Hampshire. The Committee's reduction is based on allocations calculated with percentages for New Hampshire coverage taken from the Arbitron 1989 Edition of Radio County Coverage Reference Report (1989 Edition), which contains data collected for 1988. This publication breaks down the listening audience of particular stations by county and makes it possible to determine the percentage of listeners who reside in a particular state. The Committee's allocation of expenses for 12 of the radio stations differs from the Commission's Audit staff's allocation. The Committee used larger percentages for five stations, and smaller percentages for the remaining seven stations. In part, the allocations differ because the Audit staff used the 1987 edition, the edition available when the radio buys were made, to allocate radio time. Moreover, the Committee was unable to find percentages listed for one AM station, and used data from a sister FM station. According to

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an Arbitron representative, data on AM and FM stations differs because station coverage differs.

The Commission concludes that the Committee's use of the 1989 edition is inappropriate. The data for this edition had not been compiled when the radio time was purchased. The Commission's past practice has been to allocate media broadcast time based on the industry data which was available when the time was purchased. Moreover, it does not appear that the Committee consistently used the 1989 edition to allocate radio time in all states, because it has not proposed any change to the allocation of radio time in Iowa. In addition, AM and FM data are not interchangeable, and thus, the Committee's use of FM station data to calculate the allocation percentage for an AM station is unacceptable. Therefore, the Commission has not revised the allocation of New Hampshire radio time.

C. TRAVEL EXPENSES - PRESS REIMBURSEMENTS

In response to the Final Audit Report, the Committee contends that the New Hampshire allocations should be adjusted to account for press reimbursements to the Committee for ground transportation, box lunches and telephone service which the Committee provided to the press who traveled with the candidate.^{3/} The Committee billed the press 150% of a first

^{3/} To support its argument, the Committee submitted Committee generated schedules of press reimbursements received that detail the dates, originations, destinations, and amounts billed for each trip leg. The trips are categorized as intrastate or interstate. The Committee also submitted copies of invoices to news agencies and checks received.

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class ticket, which it contends did not exceed the pro rata share of the actual cost, and assigned two thirds of that amount to the cost of the flight, and one third to ground transportation costs. The Committee contends that it incurred one half of its ground related costs at the point of departure, and the other half at the point of arrival. The Committee calculated that "for each one tour leg for which reimbursement had been received, 16.5% per tour leg should be deductible from the allocable expenditures." Attachment 4, page 2. Therefore, the Committee deducted 33% of all press reimbursements for intrastate flights and 16.5% for all interstate flights relating to Iowa and New Hampshire, resulting in a reduction of \$3,772.25 to the expenditures allocable to Iowa and \$3,978.64 to those allocable to New Hampshire. The Committee's proposed reduction is a new argument. The allocation of media transportation costs to the state expenditure limitations was not at issue in the Interim and Final Audit Reports.

The Commission rejects the Committee's proposed allocation of these expenditures. The Committee has not documented which specific expenditures in Iowa and New Hampshire were related to media travel, but bases its calculations on percentages of the amount charged to the media. There is no factual basis for the Committee's proposed allocation percentages. Moreover, it is doubtful whether any of the amount charged to the media has been allocated to the state expenditure limitations. Transportation and services made available to media personnel are generally exempt from allocation to the state expenditure limitations. 11

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C.F.R. § 106.2(c). Based on the available documentation, the Audit staff is unable to accurately allocate the media transportation costs to the state expenditure limitations. Since the Committee has provided no documentation to support this deduction, the allocation of these expenditures remains unchanged.

D. AMERICAN EXPRESS

The Committee originally allocated American Express charges of \$3,489.38 to Iowa and \$8,423.14 to New Hampshire. In the Interim Audit Report, the Audit Division accepted the Committee's allocation for New Hampshire and increased the Iowa allocation by \$513 to \$4,002.38. In response to the Interim Audit Report, the Committee argued that the amount allocable to Iowa should be reduced to \$1,664.50 and that the amount allocable to New Hampshire should be reduced to \$670. However, the Audit Division's allocation of these expenditures remained the same in the Final Audit Report as it had been in the Interim Audit Report. In response to the Final Audit Report, the Committee again revises its allocations and proposes reducing the figures to \$1,570.87 in Iowa and \$763.60 in New Hampshire, based on charges for travel and subsistence expenses for the candidate and his traveling companions. The Committee contends that these persons did not remain in Iowa or New Hampshire for five or more consecutive days. The Committee submitted documentation including credit card receipts, hotel bills, and the candidate's itinerary. The documentation reveals that the candidate did not remain in the states for five or more days.

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Therefore, the Commission has reduced the amount of American Express charges allocated to Iowa to \$3,974.18, and to New Hampshire to \$5,242.68. The Commission made no further reductions to the allocable amounts because the documentation indicated that members of the candidate's traveling party remained in the states for five or more consecutive days.

E. VOTER CONTACT SERVICES - ANNE STONE & ASSOCIATES

The Committee engaged Anne Stone & Associates ("ASA") to do direct mailing services. The Committee originally allocated \$57,150.57 in payments to ASA to Iowa and \$37,599.44 to New Hampshire. In the Interim Audit Report, the Audit staff allocated additional amounts for payments to ASA totaling \$63,895.87 in Iowa and \$41,610.12 in New Hampshire, including a \$2,500 cancellation fee. In its response to the Interim Audit Report, the Committee contended that certain expenditures were exempt from allocation as fundraising, and that the cancellation fee was not allocable to the state expenditure limitations.

Based on the Committee's response, the Audit staff revised the allocations in the Final Audit Report to \$59,861.55 for Iowa and \$38,982.90 for New Hampshire. However, the Audit staff rejected the Committee's argument that the cost of two direct mail pieces entitled "Differences" sent to Iowa and New Hampshire were exempt fundraising expenses. The Audit staff noted that the Committee did not submit a copy of the "Differences" pieces or other documentation of a fundraising message. Moreover, the order date of the New Hampshire piece was within 28 days prior to the New Hampshire primary and, thus,

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it could not be exempted as a fundraising expense. 11 C.F.R. §100.8(b)(21)(iii). The Audit staff also included the cancellation fee as an allocable expenditure.

In response to the Final Audit Report, the Committee proposes a deduction of \$2,666.44 from the New Hampshire state expenditure limitation and \$4,316.03 from the Iowa allocation, based on the cancellation fee and the two "Differences" pieces. The Committee contends that the packages entitled "Differences" were exempt fundraising appeals. The Committee states that its "Final Blue Book Mailing Report", which reflects the results of direct mail fundraising, lists the "Differences" packages, and the quantities listed match the amount in the invoices for the "Differences" pieces. Attachment 4, page 4. The Committee contends that the Audit staff has relied on invoice dates rather than the dates that the orders were placed or the mailings occurred. The mailings occurred on "December 4, 7, and 15, 1987 and January 3, 1987 (sic) which are more than 28 days before the New Hampshire Primary and, thus, the costs of the mailings fall within the fundraising exemption." Id. The Committee further contends that the postage expenses associated with the mailings should not be allocable to the states. On December 23, 1991, the Committee submitted a sample of one of the three "Differences" pieces. The letter contains an explicit fundraising solicitation: "I need your help now. Please send your check today for whatever you feel you can afford." The Committee contends that "all three mailings were similar in

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nature and were fundraising solicitations." Attachment 6, page 1.

Based on the documentation submitted by the Committee, the Commission has reduced the allocation of expenditures to Iowa by \$2,620.38. The "Differences" piece contains an overt fundraising solicitation, and the order date for the piece, December 23, 1987, was more than 28 days before the Iowa caucus. 11 C.F.R. § 100.8(b)(21). However, the Commission has not reduced the allocation of expenditures to New Hampshire. While the "Differences" piece was fundraising in nature, the invoices indicate a "Date of Order", of January 25, 1988, within 28 days of the New Hampshire primary. There is insufficient documentation to establish when the pieces were actually mailed in New Hampshire. While mailing dates listed in the Committee's "Final Blue Book Mailing Report" conflict with the order date on the invoice, the Committee has provided no documentation to support its assertion that the "Final Blue Book Mailing Report" accurately reflects the mailing dates.

Moreover, the Commission does not accept the Committee's contention that the cancellation fee is not allocable to the state expenditure limitations. The original order was made to influence the Iowa and New Hampshire primaries and all associated costs are allocable to the state expenditure limitations. The cancellation fee is a cost incurred in connection with the Committee's agreement with ASA. As such, it is also allocable to the state limitations. The Commission has not revised the allocation of this amount.

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F. POSTAGE

The Committee did not contest the allocation of postage expenditures totaling \$53,257.35 to Iowa and \$20,455.73 to New Hampshire in its response to the Interim Audit report. However, in response to the Final Audit Report, the Committee proposes a \$1,578.68 reduction in the allocation of postage expenditures to Iowa. The Committee contends that certain postage expenses were entirely or partially unrelated to Iowa, and that no checks exist to prove that other postage expenses were incurred. The Committee submitted additional documentation concerning the postage expenditures, including a listing of checks paid to the United States Postmaster. Based on its review of the documentation submitted by the Committee, the Commission has revised the postage allocation for Iowa to \$41,538.42, a reduction of \$936.20.

G. POLLING

The Final Audit Report allocated polling expenditures paid to Tarrance and Associates totaling \$16,390.24 to the New Hampshire state expenditure limitations, including a \$4,500 payment for which no documentation was available. Since documentation for the payment had not been provided, the Commission's Audit staff based the allocation on the date of the payment and the fact that most of the other invoices to the firm were related to Iowa or New Hampshire. In response to the Final Audit Report, the Committee submitted an invoice which indicates that the payment was for a survey conducted in South Carolina. Therefore, the Commission has reduced the amount of Tarrance and

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Associates expenditures allocable to the New Hampshire state expenditure limitation to \$11,890.24.

H. REFUNDS AND REBATES

The Final Audit Report included credits for refunds totaling \$1,140.18 in New Hampshire and \$3,746.46 in Iowa. In response to the Final Audit Report, the Committee proposes credits for refunds totaling \$5,738.51 in New Hampshire and \$10,995.95 in Iowa. The Committee submitted copies of refund checks and documentation such as invoices. The Commission's Audit staff reviewed the refunds and concluded that certain refunds proposed by the Committee related to expenditures which had not been allocated to the state expenditure limitations, and that the Committee submitted inadequate documentation to support other refunds. Based upon this review, the Commission has credited \$5,651.65 for the remaining refunds to the Iowa state expenditure limitation and \$1,303.35 to the New Hampshire state expenditure limitation.

I. TESTING THE WATERS ACTIVITIES

Campaign for Prosperity ("CFP"), a leadership PAC associated with Congressman Jack Kemp, made testing the waters expenditures on behalf of his presidential campaign. The Final Audit Report analyzed CFP expenditures based on the Commission's audit of CFP^{4/}, Audit staff review of CFP disclosure reports, and documentation submitted in response to Commission subpoenas

^{4/} The Commission conducted an audit of CFP pursuant to 2 U.S.C. § 438(b), which covered the period from January 1, 1987 to June 1, 1988.

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issued to CFP and the Committee that requested CFP 1986 records related to Iowa and New Hampshire. In the Final Audit Report, the Commission concluded that certain CFP activities in Iowa and New Hampshire appear to be connected to Congressman Kemp's prospective presidential bid.^{5/} These activities included travel by CFP staff and Congressman Kemp to Iowa and New Hampshire where the itineraries provide evidence of a possible testing the waters purpose. Congressman Kemp appears to have campaigned primarily on his own behalf during these trips rather than on behalf of other candidates or the Republican party.

In particular, the Commission concluded that a trip by the candidate to Des Moines on November 25, 1986, to meet with farm and business associations was a testing the waters campaign trip. During this trip, the candidate was interviewed by the Des Moines Register, KCCI TV/Radio, WHO Radio, the Iowa Newspaper Association, and Tribune Radio Network which has 40 affiliates in 5 states. He also attended a "JK rally-dinner", and an Iowa Resources PAC luncheon. The Commission considered a number of factors in making its determination, including the fact that: the trip was close to the beginning of Congressman Kemp's presidential campaign; the itinerary is indistinguishable from a presidential campaign trip, as it included a number of interviews and a rally; the trip was after the general election;

^{5/} It should be noted that the Presidential Committee reports its initial activity as beginning on November 24, 1986.

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and the events do not appear to be primarily related to campaigning for Iowa candidates or the Republican party.

In addition, the Commission concluded that the candidate's trip to New Hampshire in September, 1986 was also a testing the waters trip. The trip itinerary indicates that the candidate attended local Republican party functions, including a Cheshire County Republican Women's Club dinner. During the trip, the candidate was interviewed by at least three radio stations, scheduled press availability at the hotel, and met with reporters from Time and the New York Times en route to the airport. A briefing memorandum attached to the itinerary notes that the "Bush people" tried to cancel the Cheshire County Republican Women's Club Dinner because it featured "a candidate for 1988" and showed "favoritism in a primary." Attachment 10, page 1. The same memorandum notes, with regard to another event on the itinerary, "[m]ost of the people in the room are uncommitted for 1988 and will be paying a great deal of attention to what you will be saying." Id. The memorandum further informs the candidate that the attendees at the Sullivan County Republican Luncheon would be attending a Bush event two days later, and he should be aware that his "presentation will make a strong impression, and will still be fresh in their minds when they see the Vice-President on Sunday." Attachment 10, page 3.

The Commission concluded that although this trip occurred before the general election, it appears to be campaign activity on behalf of Congressman Kemp rather than campaigning for the

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Republican party or New Hampshire candidates. The fact that the events on the itinerary for the trip are described in the briefing memorandum in comparison to activity by the "Bush people" is evidence that the trip was testing the waters campaigning. Moreover, the events include a number of interviews which appear to be intended to benefit Congressman Kemp's presidential campaign.

On November 10, 1986, the candidate traveled to Manchester, New Hampshire to address the state bar association on the subject of tax reform, and to hold a press conference. The Commission concluded that this trip appears to be testing the waters because of its proximity to the beginning of Committee activities in November, 1986. The trip occurred after the general election, and does not appear to be related to campaign activity on behalf of the Republican party or New Hampshire candidates.

The Commission considered these testing the waters expenditures, totaling \$2,498.26, to be in-kind contributions by CFP to the Committee which are allocable to the Iowa and New Hampshire state expenditure limitations and subject to repayment under 26 U.S.C. § 9038(b)(2). Thus, the Final Audit Report allocated testing the waters expenditures by CFP totaling \$688.20 to the Iowa state expenditure limitation, and \$1,093.56 to the New Hampshire state expenditure limitation.

In its response to the Final Audit Report, the oral presentation, and supplemental response, the Committee contends that the CFP expenditures were not testing the waters

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expenditures. The Committee states that in the audit of the Dole for President Committee, the Commission "refused to find testing-the-waters activity except in limited situations where clear statements or evidence relating to Senator Dole's presidential campaign purposes existed ... which demonstrated that Senator Dole was publicly exploring his potential candidacy." Attachment 4, pages 7-8. The Committee maintains that in the Dole audit, the Commission "rejected a standard based upon the occurrence or timing of appearances, and instead required substantial evidence that the individual held himself or herself out to the public as a potential candidate." Attachment 5, page 7.

The Committee believes that the Commission should consider only actions and speeches, rather than timing, motive, or the totality of the circumstances surrounding an event to determine whether the event was testing the waters. The Committee asserts that the Commission should not "attempt to define whether or not the individual has made an appearance for one purpose or another as long as the appearance is in itself neutral, and ... does not make a statement on candidacy or a solicitation." Attachment 5, page 40.

The Committee further argues that the evidence supporting a testing the waters finding here was less substantial than the evidence of testing the waters in the Dole audit. For the November 25, 1986 trip to Des Moines, Iowa, they state that Congressman Kemp had a rally with Will Lynch who "had been a Republican candidate for state representative in the 1986

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election."6/ Attachment 4, page 10. The Committee contends that there is no indication in the itinerary for the trip that the candidate made references to his potential candidacy or solicited funds for his future campaign during scheduled interviews and events. Similarly, the Committee asserts that there is no evidence that the candidate made public statements concerning his candidacy or engaged in fundraising "or any other activities clearly designed to explore his candidacy" during his trip to Manchester, New Hampshire on November 10, 1986. Id.

Moreover, the Committee contends that the September trip to New Hampshire was not testing the waters. The Committee emphasizes that the briefing memorandum states that the president of the Cheshire County Republican Women's Club stated that Congressman Kemp was not a candidate and was only trying to assist the club in raising money. The Committee argues that there is no indication that the candidate's speeches at any of the events during this trip included references to his potential candidacy or solicited funds for his future campaign. The Committee submits that "references in the memorandum to then-Vice President Bush having a bar-b-que and to Secretary Kemp's presentation making a strong impression are meaningless without clear, objective and compelling evidence that Secretary

6/ In its supplemental response of December 23, 1991, the Committee provided a statement by Will Lynch declaring that he had been the Republican candidate, and that Congressman Kemp attended a debt retirement dinner.

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Kemp and CFP expressly and publicly explored his potential candidacy at these events." Attachment 4, page 12.

In support of its arguments, the Committee provided a statement by the candidate's former press secretary that Congressman Kemp did not give formal prepared speeches at press availabilities during these trips, but rather answered questions, and that the events in the September trip to New Hampshire were Republican fundraising events. Attachment 6, page 2. Moreover, the Committee asserts that between September and December 1986, the candidate attended and spoke at events in California, North Carolina, Illinois, Arizona, Alabama, Georgia, Michigan, Florida, Texas, and South Carolina, in addition to the trips to Iowa and New Hampshire.

Finally, the Committee contends that the Commission should require clear proof of a testing the waters purpose because a testing the waters finding "may come dangerously close to encroaching upon the First Amendment right to free speech. The Commission must be careful to provide clear, definite and objective standards to avoid chilling protected political speech." Attachment 4, page 9. By concluding that CFP's activities were testing the waters, the Commission would violate the First Amendment because "the Commission's test is unconstitutionally vague and violates the due process guaranteed by the First and Fifth Amendments." Id.

The Commission has previously considered similar issues related to testing the waters expenses paid by a committee other than a candidate's authorized committee in two Advisory Opinions

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("AO"), AO 1985-40 and AO 1986-6. In AO 1985-40, the Commission concluded that expenses paid by a political committee for an individual considering whether to become a candidate would be considered testing the waters expenses if such activities related to the potential candidacy and that individual subsequently became a candidate. In determining whether certain expenditures would be considered testing the waters, the Commission looked to the purpose of the expenditures. In contrast, in AO 1986-6, the Commission concluded that a multi-candidate committee could pay an individual's expenses related to various activities to promote the Republican party and to solicit funds, provided that references to that individual's potential candidacy were incidental to the events and activities conducted by the multi-candidate committee. The opinion distinguishes PAC events which include only incidental contacts and incidental remarks about an individual's potential candidacy, such as those in response to questions, from campaign activity on behalf of a potential candidate.

Similarly, in the audit of Dole for President, the Commission examined each event for evidence of a testing the waters purpose. The Commission concluded that certain events were apparently related to Senator Dole's prospective presidential campaign. The focus of the Commission's discussion was on the distinction between party building efforts by a prominent party figure and testing the waters activity. Factors the Commission considered in reaching its conclusion included: the timing of events in relation to the beginning of

presidential committee activity; the timing of events in relation to elections; evidence of campaigning for other federal candidates involved in elections in the states or for the party generally; and statements made in briefing memoranda and speeches. Dole for President Inc., Statement of Reasons, approved February 6, 1992.

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The Commission is not persuaded by the Committee's arguments. The Commission examined a number of CFP expenditures and concluded that there was sufficient evidence of testing the waters activity in only the three trips still at issue. The available evidence is sufficient to indicate that the three trips were related to the candidate's prospective campaign, and thus, were testing the waters activities. The timing of the events close to the start of Committee activities, the dearth of campaign activity for local candidates^{7/}, the statements in the briefing memorandum, and the type of events and interviews involved in these trips are evidence of testing the waters activity. To counter this conclusion, the Committee could have provided documentation of the text of speeches or the content of

7/ The Committee's assertion that Will Lynch had been a 1986 Republican candidate and that the rally was a debt retirement dinner is not determinative. A rally with a person who once was a candidate is significantly different from campaigning for a person who is currently a candidate. While a rally with a current local candidate may be construed as campaign activity on his or her behalf, a rally after the election with a former candidate, even if it raised funds to retire the local candidate's debts, benefited Congressman Kemp, by giving him a forum with the former candidate's supporters. Moreover, this is only one of a number of apparent testing the waters activities during the November 25, 1986 trip.

interviews. Since it has not done so, there is no evidence to support its argument.

The Commission's conclusion is consistent with the precedents of the Dole audit and Advisory Opinions. The Committee misinterprets the Commission's decision in the Dole audit. The Commission considered several factors including the timing of appearances in determining which events were testing the waters in that case. Moreover, the evidence in the Dole audit was similar to the evidence of testing the waters activity here.

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The Committee apparently believes that the Commission should never find that an event was testing the waters activity unless there is evidence that a prospective candidate made a public statement of potential candidacy at the event. However, in cases where, as here, there is no available evidence concerning public statements of potential candidacy, the Commission will consider evidence of the types of events, the timing of events, and the apparent purpose of events to support a conclusion that testing the waters activity occurred. The Committee's proposed rule requires evidence which is not readily available to the Commission. Moreover, an unequivocal statement of candidacy arguably goes beyond testing the waters activity.

The Committee's constitutional argument is equally flawed. The Commission considered a number of factors in determining which CFP expenditures were testing the waters. It is possible that other CFP expenditures were related to the candidate's prospective presidential campaign, but the Commission included

only those expenditures where documentation provided a clear indication that the trips were related to testing the waters activity. The Commission's regulations and previous decisions in Advisory Opinions and audits provide "clear, definite and objective standards to avoid chilling protected political speech." Attachment 4, page 9. The Commission's decision is consistent with the standards delineated in its regulations, Advisory Opinions, and other audit matters.

Therefore, the testing the waters expenditures remain allocable to the Committee's state expenditure limitations and subject to repayment as excessive expenditures. Moreover, the expenditures by CFP were in-kind contributions. See AO 1985-40; MUR 2133. The Commission's regulations provide that testing the waters expenditures are qualified campaign expenses that count against the state and overall expenditure limitations if the individual on whose behalf the testing the waters expenditures are made subsequently becomes a candidate. 11 C.F.R. §§ 9034.4(a)(2); 106.2(a)(2); See 11 C.F.R. §§ 100.7(b)(1); 100.8(b)(1). The in-kind contributions from CFP to the Keap campaign were expenditures equivalent to expenditures by the Committee itself. 11 C.F.R. §100.7(a)(1); 100.8(a)(1); 109.1(c).

J. FIVE DAY RULE

In addition to the expenditures contested by the Committee, the Commission has adjusted the amounts allocable to the Iowa state expenditure limitation to conform with the Commission's application of the five day rule in the audit of another 1988 campaign. See Attachment 9. The Commission has excluded

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\$3,967.75 for national staff travel and \$1,787.42 for national staff payroll from the Iowa state expenditure limitation for expenditures related to the travel and salaries of three individuals who spent periods of time in Omaha, Nebraska in connection with the candidate's Iowa campaign. The individuals' presence in Iowa with respect to the five-day rule were not established. Consequently, these expenditures are not allocable to the Iowa state expenditure limitation.

III. STALE-DATED CHECKS

Section 9038.6 of the Commission's regulations provides that if a committee has outstanding checks that have not been cashed, the committee should inform the Commission of its efforts to locate and encourage the payees to cash the outstanding checks, and submit a check for the total amount of the outstanding checks made payable to the United States Treasury.

The Committee had outstanding checks as of February 28, 1989, totaling \$76,284.78. The Interim Audit Report recommended that the Committee provide evidence that the checks are not outstanding, or attempt to locate the payees and encourage them to cash the checks. The Committee did not address this finding in its response to the Interim Audit Report; however, the Committee submitted documentation in response to other findings including copies of negotiated refund checks. Based on this information and a review of the Committee's disclosure reports,

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the Commission determined that the total amount of outstanding checks as of October 30, 1989 was \$126,810.66. Therefore, the Commission made an initial determination that the Committee pay \$126,810.66 to the United States Treasury pursuant to 11 C.F.R. § 9038.6.

In response to the Final Audit Report, the Committee states that according to its records, \$80,571.88 in outstanding contribution checks have been resolved. The Committee provided documentation concerning the outstanding checks in its response to the Final Audit Report. The Committee did not include checks drawn on its operating account, which total \$15,555.90, in its figures. On December 23, 1991, the Committee submitted additional documentation concerning \$9,096.88 in checks from its operating account.

The Commission has reviewed the documentation submitted by the Committee and has reduced the repayment by \$68,411.88, for checks written on the contribution account, and \$9,096.88, for checks written on the operating account. The documentation provided by the Committee was not sufficient to reduce the repayment for the remaining amount of outstanding checks. Therefore, the Commission has made a final determination that the Committee must pay \$49,301.90 to the United States Treasury for the checks which remain outstanding.

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V. FINAL REPAYMENT DETERMINATION

Therefore, the Commission has made a final determination pursuant to 11 C.F.R. § 9038(c)(4) that for the foregoing reasons Congressman Jack Kemp and the Jack Kemp for President Committee must repay \$103,555.03 to the United States Treasury.

ATTACHMENTS

1. Interim Audit Report, approved August 25, 1991 (portions omitted).
2. Committee's Response to Interim Audit Report, Appendices omitted (February 7, 1990, portions omitted).
3. Final Audit Report, approved by the Commission July 25, 1991.
4. Committee's Response to the Final Audit Report and initial repayment determination dated November 1, 1991.
5. Transcript of Oral Presentation before the Commission on December 10, 1991.
6. Committee's Supplemental Response dated December 23, 1991.
7. Memorandum from the Audit Division dated December 5, 1991.
8. Memorandum from the Audit Division dated January 8, 1992.
9. Memorandum from the Audit Division dated March 30, 1992.
10. Briefing Memorandum dated September 18, 1986.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MW004468

November 6, 1992

MEMORANDUM

TO: THE COMMISSIONERS

THROUGH: JOHN C. SURINA
STAFF DIRECTOR

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: REPAYMENT OF \$103,555.03 RECEIVED FROM THE
JACK KEMP FOR PRESIDENT COMMITTEE

This informational memorandum is to advise you of a repayment check in the amount of \$103,555.03 received from the Jack Kemp for President Committee. The check represents full payment as requested in the final repayment determination.

Copies of the Committee's accompanying letter, the repayment check, and receipt showing delivery to the Treasury are attached.

If you have any questions concerning this matter, please contact Ray Lisi at 219-3720.

Attachments as stated

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PIPER & MARBURY

1200 NINETEENTH STREET, N.W.
WASHINGTON, D. C. 20036-2430
202-861-3900
FAX 202-223-2088

BALTIMORE
NEW YORK
PHILADELPHIA
LONDON
EASTON MD

JOHN J. DUFFY
202-861-3938

October 27, 1992

VIA HAND DELIVERY

Ms. Delanie D. Painter
Federal Election Commission
999 E Street, N.W., #657
Washington, D.C. 20463

Re: Jack Kemp for President Committee Audit

Dear Ms. Painter:

I enclose a cashier's check in the amount of \$103,555.03, representing full satisfaction of the Commission's repayment determination in the above-referenced matter.

If you have any additional questions, please give me a call.

Sincerely,

John J. Duffy

JJD:cpm

Enclosure

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FEDERAL ELECTION COMMISSION
 WASHINGTON DC 20463
**RECEIPT FROM THE
 UNITED STATES DEPARTMENT OF TREASURY
 FOR A REPAYMENT OF
 1988 PRESIDENTIAL PRIMARY MATCHING FUNDS**

November 5, 1992

Received on November 5, 1992, from the Federal Election Commission (by hand delivery) a cashier's check (#03950477) drawn on the Signet Bank in the amount of \$103,555.03. The check represents a full repayment from the Jack Kemp for President Committee as requested in the final repayment determination in the final audit report.

Pursuant to 26 U. S. C. §9038(d), this check should be deposited into the Matching Payment Account.

Jack Kemp for President Committee
 Amount of Repayment: \$103,555.03

Presented by

Received by

[Signature]
 for the
 Federal Election Commission

[Signature]
 for the
 United States Treasury

Branch No 1404 BE TOWSON MD October 27 22 No 03950477

CASHIER'S CHECK

PAY TO THE ORDER OF ***U.S. TREASURY DEPARTMENT*** \$ **103,555.03**

Re: Jack Kemp for President

SIGNET BANK
 Virginia

[Signature]
 AUTHORIZED SIGNATURE

⑈03950477⑈ ⑆055001902⑆ 44⑈00027084⑈

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